

1-384

NO. _____

Supreme Court, U.S.
FILED

AUG 28 1991

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

IN THE MATTER OF W. LARRY COHRAN

(Supreme Court Docket No. 250),

Petitioner.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

Victoria D. Little
Attorney for Petitioner
Georgia State Bar No. 454450
217 North McDonough Street
Decatur, Georgia 30030
(404) 378-4893

August 27, 1991



QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure of the State Bar Rules to provide for and the Supreme Court of Georgia to afford a corrective judicial process to remedy a wrong discovered by reasonable diligence in disciplinary proceedings wherein a professional license, a form of property, may be suspended or revoked violates the due process clauses of the 5th and 14th Amendments of the Constitution of the United States? -
2. Whether the failure to consider the prejudice caused to the respondent attorney by the approximate ten year delay between the time of institution of the proceedings and its conclusion violates the due process clauses of the 5th and 14th Amendments of the Constitution of the United States?

3. Whether the prejudice caused to the respondent attorney by his reliance upon the representations and promises of State Bar Counsel that the disciplinary proceeding would be dismissed in foregoing his right to take certain evidence and discovery which resulted in his being unable to confront and cross-examine the complaining witness; to obtain evidence which was exculpatory in nature; and to effectively defend himself against the charge made against him after the State Bar Counsel breached its promise violates the due process clause of the 14th Amendment and the right to a fair trial?

TABLE OF CONTENTS

Question Presented for Review.....	i
Table of Contents.....	iii
Table of Authorities.....	iv
Petition for Writ of Certiorari.....	1
Jurisdictional Statement.....	1
Constitutional Provisions,	
Statutes and State Bar Rules.....	2
Statement of the Case.....	3
Reasons for Granting the Writ.....	17
Conclusion.....	27
Certificate of Service.....	28
Appendices.....	A-1

TABLE OF AUTHORITIES**Constitutional Provisions**

5th Amendment.....	2, App.
14th Amendment.....	2, App.

Statutes

<u>O.C.G.A.</u> 9-11-29.1.....	2, App.
<u>O.C.G.A.</u> 9-11-30 (f).....	2, App.
<u>O.C.G.A.</u> 9-11-56 (f).....	2, 12, App.

Georgia State Bar Rules

Rule 4-209.....	2, App.
Rule 4-212.....	2, 17, App.
Rule 4-213.....	2, App.
Rule 4-214.....	2, App.
Rule 4-215.....	2, App.
Rule 4-216.....	2, App.
Rule 4-217.....	2, App.
Rule 4-218.....	2, 19, App.
Rule 4-219.....	2, 19, App.
Rule 4-221.....	2, 17, App.
Rule 4-225.....	2, 25, App.

<u>Armstrong v. Manzo</u> , 380 U. S. 545, 85 S. Ct. 1187 (1965).....	24
<u>Barker v. Wingo</u> , 407 U. S. 514 (1972) ..	25
<u>Berger v. U.S.</u> , 295 U. S. 78, 55 S. Ct. (1934).....	23
<u>DeKrasner v. Boykin</u> , 54 Ga. App. 29 (1936).....	23
<u>Frank v. Mangum</u> , 237 U. S. 309, 335, 35 S.Ct. 582... .	22
<u>Giles v. Maryland</u> , 386 U. S. 66, 100, 87 S. Ct. 793 (1967).....	26
<u>In the Matter of Bronson</u> , S.C. 644 (1989).....	23
<u>In re Bridwell</u> , 447 P.2d 116 (1970)....	25
<u>In re Elliott</u> , 73 Kan. 151.....	25
<u>In re Briggs</u> , 502 N.E.2d 879 (1987)....	25
<u>In re Ruffalo</u> , 390 U. S. 544.....	24
<u>In re Wireman</u> , 267 N. E. 2d 1368.....	25
<u>Mooney v. Holohan</u> , 294 U. S. 103, 55 S. Ct. 340.....	22
<u>(1934)</u>	
<u>Moore v. Dempsey</u> , 261 U. S. 86, 90-91, 43 S. Ct. 265.....	22
<u>Mrakich v. State Bar of California</u> , 506 F.2d 633.....	25
<u>State v. McMillan</u> , 235 Ga. 154, 319 S.E.2d 1 (1984).....	23

<u>Taylor v. State Bar of California,</u> 521 P.2d 470.....	25
<u>U. S. v. Augers,</u> 427 U. S. 112, 96 S. Ct. 292 (1976).....	26
<u>U.S. v. Jackson,</u> 621 F.2d 216 (5th Cir. 1980).....	19
<u>U.S. v. Opager,</u> 589 F.2d 799 (5th Cir. 1979).....	20
<u>U.S. v. Scanland,</u> 495 F.2d 1104 (5th Cir. 1974).....	19
<u>U.S. v. Waddell,</u> 800 F.2d 1404 (5th Cir. 1986).....	20
<u>Vaughn v. State Bar of California,</u> 511 P.2d 1158.....	25
<u>Washington v. Texas,</u> 388 U. S. 14 (1967).....	20
<u>Weiner v. Fulton County,</u> 113 Ga. App. 343, 345, 148 S.E.2d 143 (1966).....	23
<u>Willner v. Committee on Character & Fitness,</u> 373 U. S. 96.....	24
<u>Wills v. Composite State Board of Medical Examiners, et al,</u> 259 Ga. 549 (1989).....	23

TABLE OF CONTENT--APPENDICES

Supreme Court Order of 5/10/91 Final Judgment.....	A-1
Supreme Court Order of 10/4/91 Interim Order for Remand.....	A-4
Report of Review Panel of 12/21/91....	A-11
Report of Review Panel of 3/6/90.....	A-15
Report of Special Master of 1/17/90...	A-66
Report of Special Master of 1/8/90....	A-91
Report of Special Master of 11/6/89...	A-95
Report of Special Master of 7/13/89....	A-96
Supreme Court Order denying rehearing of 5/30.91.....	A-102
Constitutional Provisions	
5th and 14th Amendments.....	A-103
Statutes Involved	
<u>O.C.G.A. 9-11-56 (f)</u>	A-103
9-11-29.1.....	A-104
9-11-30 (f).....	A-104
Georgia State Bar Rules and Regulations	
Rule 4-209.....	A-105
Rule 4-212.....	A-105
Rule 4-213.....	A-105
Rule 4-214.....	A-106

Rule 4-215.....	A-107
Rule 4-216.....	A-108
Rule 4-217.....	A-108
Rule 4-218.....	A-109
Rule 4-219.....	A-110
Rule 4-221.....	A-111
Rule 4-225.....	A-112
Motion to Remand, Affidavit of Victoria D. Little--4/3/90.....	A-112

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioner, W. Larry Cohran, prays that a Writ of Certiorari issue to review the Order and Judgment of the Supreme Court of the State of Georgia entered October 4, 1990 and May 10, 1991, and the denial of a timely motion for rehearing entered on May 30, 1991, as hereinafter set forth.

JURISDICTIONAL STATEMENT

On October 4, 1990, the Supreme Court of Georgia affirmed the entry of summary judgment by the special master and remanded the case to the review panel for re-consideration of its recommendation of disbarment. On May 10, 1991, the Supreme Court of Georgia entered its' final judgment suspending petitioner from the practice of law for a period of two years commencing

June 15, 1991. Petitioner timely filed for rehearing which was denied on May 30, 1991. Within ninety (90) days from that date, petitioner files this Petition invoking jurisdiction under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION, STATUTES
AND STATE BAR RULES

5th and 14th Amendments to the Constitution of the United States.

Official Code of Georgia Annotated
O.C.G.A. 9-11-29.1, O.C.G.A. 9-11-30 (f),
and O.C.G.A. 9-11-56 (f).

State Bar of Georgia Rules and Regulations
Rule 4-209, Rule 4-212, Rule 4-213, Rule 4-214, Rule 4-215, Rule 4-216, Rule 4-217, Rule 4-218, Rule 4-219, Rule 4-221, Rule 4-222, and Rule 4-225.

STATEMENT OF THE CASE

In this disciplinary action, a summary judgment was entered finding Petitioner guilty of making a wilful misrepresentation to his client that he had recovered her house and was charging her for the recovery of same although no testimony was submitted from the client. Petitioner has been suspended from the practice of law for a period of two year from June 15, 1991.

A formal complaint was filed against the Petitioner on April 16, 1982, for alleged conduct occurring during the first half of 1979. Petitioner responded denying all alleged misconduct and filed a motion for jury trial pursuant to Bar Rule 4-214 (b). In March, 1986, Petitioner moved that the case be dismissed asserting various grounds including unconstitutional delay, and prejudice which affected the fundamental fairness of the entire proceeding.

In August, 1986, the State Bar took the

deposition of Mae Norey although Petitioner had notified it of a legal conflict and filed the necessary papers to protect his interest.

In May, 1988, the Motion to Dismiss was denied, and in July, 1988, a discovery deadline was set for December 31, 1988, primarily because Petitioner's counsel was involved in a federal criminal trial which would take several months to complete and would not be able to participate in discovery until the matter was concluded.

In November, 1988, Petitioner sought certain discovery from the State Bar which included the residence and employment addresses and telephone numbers of Norey--the complaining witness or complainant, the name and address of the court reporter who took the deposition of Norey, and the deposition and all statements made by Norey. Petitioner noticed the deposition of Mae Norey for the first week in December. Bar

counsel had several conversations with Petitioner's counsel and Petitioner in which he represented that Norey was refusing to cooperate in discovery and the prosecution of the case; the State Bar was going to dismiss the case against Petitioner because it was the general practice of the Bar to dismiss cases wherein the complaining witness refused to cooperate in discovery and in prosecution of the case; that there was no reason to pursue take Norey's deposition or do any other discovery; that the Bar would obtain an affidavit from Norey stating that she did not want to pursue the matter; and that the Supreme Court always dismissed the case when the State Bar moved for dismissal. Based upon these promises and representations, the deposition of Norey was cancelled. On December 12, 1988, the State Bar counsel joined by the Special Prosecutor filed a Motion to Dismiss the case because Norey no longer wished to

proceed with the complaint; the State Bar had no compulsory process to require her to appear for trial; and without her assistance, it could not prove its case beyond a reasonable doubt.

On December 14, 1988, the special master suggested that the State Bar take the deposition of Norey to be used in prosecuting the case, sua sponte extended the discovery period for 30 days although he had already stated that it would not be extended for any reason and requested that the State Bar brief why the deposition could not be taken for use at trial and what essential elements of the case could not be proved by other means. On January 5, 1989, the State Bar filed a Statement of Dismissal that Norey did not wish to pursue the matter; it was not based upon her financial situation because the State Bar would pay her expenses to appear as a witness; that the State Bar did take her deposition on

August 11, 1986; that it was not persuasive; that it was doubtful that even if it used the Norey deposition it would be able to prove its case beyond a reasonable doubt; and it again requested dismissal of the case and declined to take her deposition. Petitioner concurred in the dismissal of the action, objected to the use of the deposition taken in 1986, and asserted that he could not properly prepare and present his defense to said action without the testimony of Mae Norey and that it was of paramount importance in this case for him to confront and cross-examine the witness who supplied the information resulting in the formal complaint. On January 19, 1989, the special master relieved the State Bar from responding to any outstanding discovery until further order of the court. Without hearing any evidence or without the submission of any evidence and based upon the State Bar's Motion to Dismiss, on July

13, 1989, the special master entered findings of facts that Respondent had represented to Norey that he had recovered the marital residence and was charging her for the recovery of same and concluded that "the undisputed facts present an issue as to whether, as a matter of law, [Petitioner's] conduct violated Rule 4-102 (d), Standard 4..." Over Petitioner's objections, the special master entered summary judgment in September, 1989, and the case was remanded by the Review Panel with direction that the special master follow summary judgment procedures. On November 6, 1989, the special master ordered the State Bar to file a motion for summary judgment no later than November 27, 1989, and to file all depositions taken in the matter, or to renew its' motion to dismiss. The State Bar reneged upon its agreement to seek dismissal of the action because it knew that summary judgment would be granted for the asking

and filed a motion for summary judgment stating almost verbatim the contentions of the special master. It refused to file the deposition of Norey asserting for the first time that it did not have the deposition of Norey, but that it was a statement that was work product. Although the Norey deposition was the only deposition that had been referred to in this matter, the special master denied Petitioner's request for sanctions for the refusal of the State Bar to file it pursuant to his previous order stating that his order did not refer to the Norey deposition. The State Bar objected to allowing Petitioner any discovery although Petitioner's discovery requests had been outstanding for more than a year. It refused to produce the deposition/statement /recorded interview of Norey pursuant to discovery request, and a request and order for exculpatory materials asserting that it was work product and that there was nothing

exculpatory in the sworn testimony. (All that is known by Petitioner is the State Bar's has asserted that the deposition is not persuasive and that it was not sufficient to prove the charges in the formal complaint).

Although Petitioner moved for an in camera inspection, the special master ruled that the deposition contained no material which was favorable or arguably favorable to Petitioner on the matter decided in Part IV of his report--which only addressed the issue formed by the special master which Petitioner has asserted is not an issue set out in the formal complaint. The implication made is that there was, in fact, favorable or arguably favorable material regarding the issues made by the formal complaint, Petitioner's answer to the formal complaint and issued made by Petitioner's response to the motion for summary judgment.

What little discovery Petitioner was

finally allowed to obtain was not provided until on and after December 11, 1989, and then, the State Bar refused to give Petitioner Norey's telephone numbers, gave the wrong address in a town that does not exist, and refused to give the name and address of the court reporter who took the deposition. Even if Petitioner had located Norey during the Christmas and New Year's Holidays, it is doubtful that her deposition could have been taken prior to January 4, 1990, when Petitioner's response to the summary judgment motion was due. Petitioner would have had to obtain some sort of compulsory process because the State Bar had already stated that she would not cooperate in discovery.

With his response to the motion for summary judgment, Petitioner filed various motions objecting to the proceeding, complaining of the unconstitutional delay and prejudice he had suffered as a result.

and requested pursuant to O.C.G.A. 9-11-56
(f) that he be allowed to obtain the
testimony of Norey. The special master
denied this request. Although Petitioner
submitted his affidavit specifically denying
that he had represented to Norey that he had
recovered the marital residence for her and
had charged her for the recovery of same;
that he had not intended to make any such
representation to her; that the funds he
retained were retained pursuant to the
agreements and understandings of the parties
along with the affidavits of other persons
and evidence which indicated that Norey was
fully aware of the status of the house and
that she knew that Petitioner did not have
to take any action to "recover" it for her.
The special master made his report finding
Petitioner guilty as a matter of law of
making a wilful misrepresentation to Norey
that he had recovered the marital residence
for her and had charged her for the recovery

of same incorporating his previous improper findings and conclusions into his new report.

Petitioner timely filed his objections and exceptions to the proceedings and the rulings of the special master complaining of the unconstitutional delay and prejudice it caused him, and asserting his right to obtain the deposition/statement/recorded interview of Norey in 1986, as a matter of right upon his offer to pay for same, in response to his discovery request and for exculpatory purposes. He also asserted that he had been denied his right to due process and a fair trial; to confront and cross-examine the witness furnishing the information for the formal complaint; and his right to defend against the charge against him.

The Review Panel entered its' report adopting the findings and conclusions of the special master. Petitioner again renewed

his objections and exceptions to the report of the special master and the Review Panel.

The case was then sent to the Georgia Supreme Court for docketing.

For months, Petitioner's counsel attempted to contact Norey at a telephone number she believed was Norey's. On March 27, 1990, Petitioner's counsel talked with Norey who stated that she knew how the house was titled; that she knew it became hers upon the death of her husband; that her husband had not transferred his interest to any third person; and that Petitioner had not represented to her nor made her believe that he had recovered the house for her or was charging her for the recovery of same. This conversation was communicated to the special master and State Bar counsel. The special master stated that the case was out of his jurisdiction and he could do nothing. State Bar General Counsel stated that he did not doubt the truth of the conversation;

declined to have a conference call with Ms. Norey; and stated that he would do nothing to correct the matter. Previous State Bar Assistant General Counsel, when asked if Norey had ever told him that Petitioner had not made the representations for which he had been found guilty, stated "not in those exact terms" and abruptly ended the conversation.

This conversation was brought to the Georgia Supreme Court's attention in the form of a Motion to Remand to which was attached the affidavit of Petitioner's counsel with a request that the case be sent back to the Review Panel with instructions that the Norey deposition be taken. Said motion was denied.

Petitioner has asserted that because the State Bar Rules do not provide any corrective judicial process in which to present newly discovered evidence or to correct the fact that he has been found

guilty of something which the complainant states never occurred, and the Georgia Supreme Court has failed to fashion any remedy although the ends of justice would require same, his due process rights have been denied under the 5th and 14th Amendment to the Constitution of the United States.

Petitioner has asserted that he had the right to a meaningful hearing at a meaningful time; that the delay in this matter was unconstitutional and resulted in extreme prejudice to Petitioner which destroyed the fundamental fairness of the proceeding in violation of the 5th and 14th Amendments to the Constitution of the United States.

Petitioner has further asserted that he had a right to rely upon the promises and representations of State Bar Counsel that the case against him would be dismissed and in cancelling the deposition of Norey; however, because of this reliance, he lost

his right to take her testimony thereby making it impossible for him to defend himself in this matter and denying his right to due process guaranteed by the 5th and 14th Amendment to the United States Constitution.

The Supreme Court has failed to address any of these issues.

REASON FOR GRANTING THE WRIT

Disciplinary rules in Georgia provide for discovery in Bar complaints. (Rule 4-212 (c) and 4-221 (b) (4)). Petitioner scheduled the deposition of the complainant (Mae Norey) within the discovery period set by the special master. Had it not been for the representations and promises of State Bar counsel that the case was going to be dismissed; that it was the general procedure to dismiss cases wherein the complaining witness refused to cooperate in discovery and assist in the prosecution of the case;

that there was no need to take any discovery; and that the Supreme Court always granted dismissal upon request of the State Bar, Petitioner would have taken the deposition of Norey. But because he relied upon these representations and promises, he cancelled the Norey deposition and lost his right to confront and cross-examine her and to obtain evidence that would have exonerated him of the charge for which he has been found guilty. The State Bar thereby gained a tactical advantage to the extreme prejudice of the Petitioner in being able to defend himself in this matter when the State Bar reneged on its' promise to seek dismissal after it knew the special master would grant summary judgment for the asking without Petitioner being restored his right to take her deposition. After the State Bar breached it promise to seek dismissal of the action by filing a motion for summary judgment instead of renewing

its' previous motion to dismiss, due process would require that Petitioner be allowed to take the deposition of Norey. However, the State Bar not only breached its' agreement, but objected to Petitioner being allowed any further discovery and went so far as to furnish erroneous information as to Norey's whereabouts. It also obstructed Petitioner's attempts to obtain the sworn testimony already taken from Norey, and its' actions were ratified by the special master, Review Panel and the Georgia Supreme Court. The actions of the State Bar counsel amounted to prosecutorial misconduct, gave the prosecution a tactical advantage to the prejudice of the Petitioner, violated the concepts of fundamental fairness under the 5th and 14th Amendment to the Constitution of the United States, and Petitioner's conviction should have been reversed. See U.S. v. Scanland, 495 F.2d 1104 (5th Cir. 1974); U.S. v. Jackson, 621 F.2d 216 (5th

Cir. 1980); U.S. v. Opager, 589 F.2d 799 (5th Cir. 1979); U.S. v. Waddell, 800 F.2d 1404 (5th Cir. 1986); Washington v. Texas, 388 U. S. 14 (1967).

Under the Bar Rules for the State of Georgia, the Supreme Court does not function as a reviewing court in the strict sense of the term. Although the Review Panel reviews the Reporter of the Special Master and the Supreme Court reviews the decision of the Special Master and the recommendations of the Review Panel, the Supreme Court has the ultimate power of decision. (Bar Rules 4-218 (a) and 4-219 (a)). The findings of the Review Panel shall be conclusive if supported by any evidence, and the Review Panel may only consider the record submitted to it by the special master. There is no appeal as of right from an adverse decision of the Supreme Court in disciplinary matters. Other professions, civil litigants, and criminal defendants are

afforded at least one appeal as of right, therefore, the procedures under which attorney discipline is conducted in Georgia denies Petitioner the equal protection of the law in that all other Georgia litigants have on appeal as of right.

Further, there is no process available wherein the Petitioner could raise and have heard the evidence that the complainant herself has stated that he is not guilty of the conduct for which he has been convicted. Petitioner has been convicted for something which technically may appear to have occurred by stacking inference upon inference although the prosecution and court has strong reason to believe it did not, in fact, occur. Although Petitioner attempted to bring the newly discovered evidence to the Court's attention in his Motion to Remand, and have it heard, the rules do not allow for the consideration of evidence at this stage in the proceeding, and the Court

failed to fashion any remedy. There are no State Courts which can hear the matter. (Bar Rule 4-225).

The requirement of "due process" is not satisfied by mere notice and hearing, if the state, through prosecuting officers acting on the State's behalf, has contrived a conviction through pretense of trial which in truth is used as a means of depriving one of liberty or property through deliberate deception of the fact finder by the presentation of evidence which is untrue. In such a case, the State's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitute depravation of liberty or property without due process. Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340 (1934); Frank v. Mangum, 237 U. S. 309, 335, 35 S.Ct. 582; Moore v. Dempsey, 261 U. S. 86, 90-91, 43 S. Ct. 265.

The prosecution has a duty not only to

use every legitimate means to bring about a just conviction, but to refrain from improper methods calculated to produce a wrongful conviction. Berger v. U.S., 295 U.S. 78, 55 S. Ct. (1934).

The right to practice law by persons authorized by law to do so has been found to be a property right. State v. McMillan, 235 Ga. 154, 319 S.E.2d 1 (1984); DeKrasner v. Boykin, 54 Ga. App. 29 (1936) and Weiner v. Fulton County, 113 Ga. App. 343, 345, 148 S.E.2d 143 (1966). The Georgia Supreme Court has stated in the case of Wills v. Composite State Board of Medical Examiners, et al, 259 Ga. 549 (1989), that:

"We see no reason why the constitutional protections offered in criminal cases should not apply equally to proceedings involving the potential loss of a professional license."

This proposition was reiterated in the disciplinary case of an attorney In the Matter of Bronson, S.C. 644 (1989).

When a state seeks to disbar a lawyer, it must proceed according to the most exacting demands of due process of law. Willner v. Committee on Character & Fitness, 373 U. S. 96; In re Ruffalo, 390 U. S. 544.

"A fundamental requirement of due process is 'the opportunity to be heard.'...It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

Armstrong v. Manzo, 380 U. S. 545, 85 S. Ct. 1187 (1965).

Although Petitioner has asserted that the almost ten year delay between the accusation and conclusion of the disciplinary matter on charges of alleged misconduct occurring over twelve years ago destroyed the fundamental fairness of the proceeding, was unconstitutional and had prejudiced the rights of the Petitioner in violation of his right to due process as guaranteed by the 5th and 14th Amendments, the Georgia Supreme Court failed to address

the matter and Petitioner was not afforded an opportunity to present evidence regarding same before the special master. Although Petitioner asserts that a Barker v. Wingo, 407 U. S. 514 (1972) is appropriate in determining whether the delay rises to a constitutional violation, the Court failed to address the matter and a conflict in decisions among the highest courts of the States exist. See In re Briggs, 502 N.E.2d 879, 886 (1987); In re Wireman, 267 N. E. 2d 1368; In re Elliott, 73 Kan. 151; Mrakich v. State Bar of California, 506 F.2d 633; Vaughn v. State Bar of California, 511 P.2d 1158; Taylor v. State Bar of California, 521 P.2d 470; In re Bridwell, 447 P.2d 116 (1970).

Additionally, the truth-seeking process is corrupted by the withholding of evidence favorable to the defense regardless of whether the evidence is directly contradictory to evidence offered by the

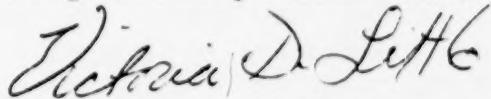
prosecution. Giles v. Maryland, 386 U. S. 66, 100, 87 S. Ct. 793 (1967). Evidence of relative minor importance might be sufficient to create a reasonable doubt. U. S. v. Augers, 427 U. S. 112, 96 S. Ct. 292 (1976). Although the State Bar and the special master stated that the deposition/statement/recorded interview of Norey was not exculpatory or arguably favorable, the very fact that Norey did mention that Petitioner had made the representation to her that he had recovered the marital residence and charged her for the recovery of same when it would be certain that the State Bar would have asked her the details of her complaint against Petitioner would be favorable in itself.

This evidence was of paramount importance to Petitioner and the denial of his right to it was a violation of his right to due process under the 5th and 14th Amendments.

CONCLUSION

Petitioner respectfully submits that this Court grant certiorari for the reasons set forth herein.

Respectfully submitted,



Victoria D. Little
Attorney for Petitioner
Georgia Bar No. 454450

217 North McDonough Street
Decatur, Georgia 30030
(404) 378-4893

CERTIFICATE OF SERVICE

I hereby CERTIFY that I have this day served copies of the foregoing Petition for Writ of Certiorari upon General Counsel for the State Bar of Georgia by placing a copy of same into a properly addressed envelope with sufficient postage attached thereto to carry same first class mail and depositing same into the United States Mail to:

Mr. William Smith, III
General Counsel
State Bar of Georgia
800 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

(404) 527-8700

this 28th day of August, 1991.

Victoria D. Little
Victoria D. Little
Attorney for Petitioner
Georgia Bar No. 454450

217 North McDonough Street
Decatur, Georgia 30030
(404) 378-4893

In the Supreme Court of Georgia

Decided: May 10, 1991

In the Matter of: W. Larry Cohran
Supreme Court Docket NO. 250

Per Curiam.

The State Bar of Georgia brought disciplinary proceedings against W. Larry Cohran, charging him with violations of Standards 3, 4, and 45 of Bar Rule 4-102.

The special master found Cohran guilty of violating Standard 4. The review panel adopted and approved the findings of the special master, made additional findings, and recommended disbarment.

We affirmed the special master's entry of summary judgment as to a violation of Standard 4, and remanded the case to the review panel for reconsideration upon the sole offense of the violation of Standard 4 of its recommendation of disbarment. In the Matter of W. Larry Cohran, 260 Ga. 436 (396 SE2d 782) (1990).

After reconsideration, the review panel has reviewed the special master's findings as to the violation of Standard 4. It now recommends disbarment.

This disciplinary proceeding has been underway for nearly ten years. It has generated a record of more than 2,500 pages. Only today does it approach finality. Considering the circumstances surrounding the entire course of this matter, we are reluctant to disbar a lawyer by means of a process that--wherever the fault may lie--has consumed nearly ten years of time and resources.¹

¹ The State Bar filed a complaint against Cohran in 1982. Cohran filed numerous motions--in excess of 35 motions during this proceeding. In 1986, the State Bar filed a notice of taking Cohran's deposition, after which notice various motions ensued. In 1988, this court relieved the special master and appointed a successor, who issued an order that all discovery be completed by January 10, 1989. In November, 1988, Cohran filed various motions to compel the original complainant to appear for deposition. (Previously, he had filed various motions opposing the State Bar's attempt for

Accordingly, we order that W. Larry Cohran be suspended from the practice of law in the State of Georgia for two years, commencing June 15, 1991.

Suspended. Clarke, C.J., Smith, P.J.,
Weltner, Hunt and Benham, JJ., and Judges
R. T. Winegarden and James Henderson concur.
Bell and Fletcher, JJ., not participating.

such a deposition.) In December, 1988, the State Bar, joined by the special prosecutor, filed a motion to dismiss the disciplinary proceeding because the complainant, who had moved to another state, was unwilling to come to Georgia to testify. In July, 1989, the special master signed an order denying the State Bar's motion to dismiss the proceedings and in September, 1989, filed a report finding as a matter of law that Cohran violated Standards 4 and 31. Cohran filed various motions. In November, 1989, the special master entered an order requiring the State Bar to file a motion for summary judgment by a specific date. After acting upon various other motions, the special master granted the State Bar's motion for summary judgment. The review panel made its report in March, 1990. The case was argued in this court in June, 1990 and decided October 4, 1990, by remand to the review panel. After the review panel completed its reconsideration, along with various motions filed by Cohran, the case was argued in this court on March 11, 1991.

In the Supreme Court of Georgia

Decided: Oct. 04, 1990

In the Matter of: W. Larry Cohran
Supreme Court Docket NO. 250

Per Curiam.

The State Bar of Georgia filed a complaint against Cohran concerning transactions involving his client, Mae Norey, alleging violations of Standards 3, 4, and 45.¹ The complaint is in three counts. The special master granted the State Bar's motion for summary judgment as to count two, finding Cohran guilty of violating Standard 4.

¹ Standard 3: "A lawyer shall not engage in illegal professional conduct involving moral turpitude."

Standard 4: "A lawyer shall not engage in professional conduct involving dishonesty, fraud, deceit, or wilful misrepresentation."

Standard 45: "In his representation of a client, a lawyer shall not...(b) knowingly make a false statement of law or fact;...(e) knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule."

Findings of Facts

1. The allegations in count two can be summarized as follows:

On January 18, 1979, after her husband's death, Norey entered into a contingency fee employment contract with Cohran relative to any claims she might have against her late husband's estate. In July 1979, Cohran presented an accounting document to Norey in which he billed her for his services in recovering various proceeds of the estate--the marital home, certificates of deposit, and personal property. Norey owned these items by right at her husband's death. The house and the certificates of deposit were owned by the Noreys as joint tenants with right of survivorship. The personal property of the husband became Norey's as of right in her claim for twelve months' support. Cohran possessed superior knowledge of the laws of intestacy and

probate. Hence, his representation to her that he was billing her for services rendered by him in recovering assets for her was false and fraudulent.

2. The special master found the following material facts to be undisputed as to this count:

(a) The terms of the January 18, 1979 agreement.²

² The parties agree that [the Complainant] contributed \$23,000.00 to the [marital residence].

It is understood and agreed to between the parties that the husband of the [Complainant] deceased this life on January 14, 1979 and said death was claimed to have been caused by suicide, and prior to his death he made an effort to transfer and dispose of funds and property in an effort to defeat any alimony claim by [Complaint].

It is agreed between the parties that [Respondent] will represent [Complainant] in all claims that she may have for money or property, both real and persona, on a "contingent fee" basis and said contingency shall be as follows:

a. [Respondent] shall charge the [Complainant] no fee for the first \$ 23,000.00 recovered of the [marital residence].

b. On all monies and property received of every kind and nature; wherever recovered of every kind and nature; wherever recovered and/or situated, no matter from whom

(b) At the time of the husband's death, the Noreys held title to their residence jointly with the right of survivorship.

(c) Cohran asserted that at the time the fee arrangement was entered into, he was not aware of the status of the title of the marital residence.

(d) The husband had not made any transfer of the marital residence or his interest in it. The entire interest passed to Norey by operation of law upon her husband's death. Cohran took no action, nor was he required to take action, for that transfer to be accomplished.

(e) Four months prior to his preparation of the accounting document, Cohran

recovered, above the \$ 23,000.00 investment in the house above set forth, the [Complainant] agrees to pay [Respondent] a sum equal to 50% of the money or value of the property recovered immediately upon said recovery and parties hereto expressly agree that the [Respondent] shall have a lien upon all said property above-mentioned for the amount that he is entitled to receive as attorney's fees.

prepared a deed for Mrs. Norey's signature, purportedly to effect the January 18, 1979 agreement, and conveying to him one-half interest in the property.

Conclusions

3. These undisputed factual circumstances establish that Cohran made a representation to Norey relative to his "entitlement" to a fee; that he billed her contrary to its terms; and that he knew at the time of the billing that under the terms of the agreement he was not entitled to the fee that he demanded. Hence, the violation was established as a matter of law.

4. The review panel adopted and approved the findings of fact of the special master and made additional findings. The review panel recommended disbarment on the following premise:

The facts of this case support not only a violation of Standard 4, but also a violation of Standards 31, 32, 61, and

63. [^]. However, the complaint alleges only a violation of standards 3, 4, and 45, so Respondent cannot be disciplined for a violation of any Standard but Standard 4. The facts supporting a violation of the other Standards can be considered in aggravation for purposes of imposing the highest level of discipline allowable for a violation of Standard 4.

5. The additional findings of the review panel were not established as a matter of law. However, under the rules and regulations of the State Bar, the violation of Standard 4 that was established as a matter of law was sufficient in and of

³ Standard 31: "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."

Standard 32: "[A] lawyer shall not advance or guarantee financial assistance to his client."

Standard 61: "A lawyer shall promptly notify a client of the receipt of his funds, securities or other properties and shall promptly deliver such funds, securities or other properties to the client."

Standard 63: "A lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and promptly render appropriate accountings to his client regarding them."

itself to warrant the discipline of disbarment. Henderson v. State, 257 Ga. 618 (362 SE2d 346) (1989) (charging for services or goods not performed or delivered can constitute a violation of the theft by taking statute, OCGA 16-8-2). Hence, it was not necessary for the review panel to consider additional matters. See Zant v. Stephens, 250 Ga. 97 (297 SE2d 1) (1982) (death penalty may be imposed upon the finding of at least one statutory aggravating circumstances, regardless of the invalidity of other circumstances).

6. We remand this case to the review panel to reconsider a recommendation of disbarment upon the sole offense of the violation of Standard 4.

Case remanded. Clarke, C.J., Smith, P.J., Weltner, Hunt and Benham, JJ., and Judges Richard T. Winegarden and James A. Henderson concur. Bell and Fletcher, JJ., not participating.

[Decided December 21, 1990]

In the Supreme Court of Georgia

In the Matter of W. Larry Cohran
Supreme Court Docket No. 250,
State Disciplinary Board Docket No. 806

REPORT OF THE REVIEW PANEL

COMES NOW the Review Panel of the State Disciplinary Board of the State Bar of Georgia, and pursuant to Bar Rue 4-218 files this, its report in the above-styled matter:

I. Case on Remand

This case returns to the Review Panel by virtue of an Order of the Supreme Court dated October 4, 1990, remanding it for reconsideration. The Court held that the finding by the Review Panel which adopted the Special Master's finding that Standard 4 of Bar Rule 4-102 has been violated by Respondent Cohran was proper. (The Court also noted that a violation of Standard 4 could, standing along, warrant disbarment). The Court further held that the Review panel had improvidently made certain additional

findings of fact which had not been proved as a matter of law in the proceedings below.

This finding was the basis for remand to the Review Panel with direction that it reconsider a recommendation of disbarment upon the sole offense of the violation of Standard 4. (Full text of the opinion appears at Pages A000198 through A000202 of the record in this case.) The case was considered when it appeared on the regular agenda of the Review Panel meeting scheduled for October 19, 1990.

II. Statement of Proceedings

Reference is made to the complex and voluminous record in this case for a detailed account of the proceedings to date. Since the issue on remand is so narrowly defined, no benefit is perceived by a restatement of the complete history of this case.

III. Respondent's Post-Remand Petitions

Mr. Cohran filed a series of pleadings

and requests which were received after the date of the remand to the Review Panel, but prior to the October 19th meeting. They were as follows: Motion for Continuance; Motion to Remand; Motion to Interview Individual Panel Members; Objection to Proceedings and Challenges to Competency, Qualifications and Objectivity of Review Panel; and his Request for Oral Argument.

Chairman Phelps recused himself from deliberations in this case, and Member Waits had to leave the meeting before action was taken. Competency of the participating Review Panel members was specifically addressed prior to any deliberation on the case. Every member left the meeting room in turn, and a separate vote was taken on the fitness of each individual.

Thereafter, each of Respondent's motions were considered individually and found to be without merit. Respondent's general objection was duly considered, and

overruled. Finally, Mr. Cohran's request for oral argument was considered, and the Review Panel decided to grant him limited argument with equal time allowed to counsel for the State Bar. Argument was confined to the subject of mitigation of discipline should a finding adverse to Respondent be forthcoming.

IV. Findings of Fact and Conclusions of Law

After extensive review and deliberation, the Review Panel hereby re-adopted the Special Master's Findings of Fact and Conclusions of Law as to violation of Standard 4 of Bar Rule 4-102.

V. Recommendation of Discipline

Based upon the foregoing, it is the recommendation of the Review Panel of the State Disciplinary Board that the Respondent, W. Larry Cohran, be disbarred from the practice of law in Georgia.

This 21st day of December, 1990.

s\H. Randolph Aderhold, Jr.

[Decided January 17, 1990]

In the Supreme Court of Georgia

In the Matter of W. Larry Cohran
Supreme Court Docket No. 250,
State Disciplinary Board Docket No. 806

REPORT OF THE REVIEW PANEL

COMES NOW the Review Panel of the State Disciplinary Board of the State Bar of Georgia and after thorough and exhaustive review of the full record in this matter and hearing oral argument from Respondent and the State Bar, hereby submits its report and recommendations of discipline to the Court.

Jurisdiction

This is a State Bar of Georgia disciplinary proceeding brought pursuant to the provisions of Part IV, Chapters 1 and 2 of the Rules and Regulations of the State Bar of Georgia. Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Georgia and the State Disciplinary Board of the State of Georgia.

Procedural Background

On March 29, 1982, the State Bar Disciplinary Board determined that there was probable cause to charge Respondent with the violation of Standards 3, 4 and 45 of Part IV, Chapter 1 of the Rules and Regulations of the State Bar of Georgia. (R.50.)

A formal complaint was filed by the State Bar on April 16, 1982 (R. 6-20) alleging that Respondent violated Standards 3, 4 and 45. Special Master Thomas C. Sanders was appointed on April 20, 1982 (R.2).

Respondent filed an answer on July 16, 1982 and denied that he had violated these standards. With his answer Respondent filed a Motion for Jury Trial (R. 97), a Motion to Strike and Motion to Dismiss (R. 99) and a Motion for Summary Judgment (R. 101).

The State Bar filed interrogatories on September 27, 1982 and Respondent answered them on November 2, 1982.

On March 26, 1984 the State Bar requested that a Special Prosecutor be appointed to assist the State Bar in the preparation of a jury trial (R. 118). On April 6, 1984, the Supreme Court directed that the Court of Appeals appoint the Special Prosecutor.

On April 9, 1984, Respondent filed a Motion to Dismiss or Deny Petition for Appointment of Special Prosecutor.

On April 11, 1984 the Court of Appeals appointed Mr. Lawrence B. Custer as Special Prosecutor (R. 128). On April 18, 1984, the Supreme Court denied Respondent's Motion to Dismiss or Deny Petition for Appointment of Special Prosecutor (R. 138).

On February 5, 1986 the State Bar filed a notice to take the deposition of Respondent (R. 139).

On February 24, 1986 Respondent filed a Motion to Dismiss, Motion to Quash Notice of Taking Deposition and Motion for Protective

Order in the Clerk's Office of the Supreme court of Georgia (\$ 141).

The State Bar filed a response to Respondent's Motion on March 7, 1986. The State Bar pointed out that there were numerous motions pending before the Special Master which were filed by Respondent. These motion had not been ruled on by the Special master and until they were, the trial could not proceed (R. 154). Also Respondent had been successful in getting a Superior Court judge to transfer on of his cases from the Special Master to the Superior Court which had been one of the causes of the delay in the progress of the case (R. 155).

On March 19, 1986 the Supreme Court dismissed Respondent's Motions as being improperly filed (R. 359).

On March 19, 1986 the State Bar filed a Motion for Sanctions (R. 359). On March 26, 1986 the State Bar filed another set of

interrogatories (R. 370), a Request for Production of Documents (R. 373), and a Request for Admission of Fact (R. 382).

On March 31, 1986 Respondent filed a Motion to Dismiss, Motion to Quash Notice of Taking Deposition and Motion for Protective Order (R. 391) and a Motion for Rehearing and Motion to Transfer (R. 401).

On April 9, 1986 the State Bar filed a notice to take the deposition of Carol Bristol, Respondent's secretary.

On June 24, 1986 the State Bar filed a notice to take the deposition of Mae Norey in Massachusetts on August 11, 1986 (R. 637). On August 5, 1986 Respondent filed a Motion to Quash Notice to Take Deposition and for Protective Order (R. 640).

On May 24, 1988, the Special Master denied Respondent's Motion to Strike and Motion to Dismiss and his Motion for Summary Judgment (R. 659).

On June 14, 1988 the Supreme Court

relieved Special Master Thomas Sanders from his duties and appointed Timothy J. Sweeney as successor Special Master (R. 660).

On July 28, 1988 the Special Master issued an order that all discovery be completed by December 31, 1989 (R.665).

On November 23, 1988 Respondent filed First Continuing Interrogatories to the State Bar of Georgia (R. 685). On November 23, 1988 Joe David Jackson filed a request for leave of absence from December 15, 1988 to January 4, 1989 (R. 696). On November 30, 1988 the Special Master granted Mr. Jackson's leave of absence (R. 711).

On December 2, 1988 the Special Master issued an order requiring all motions to be filed on or before January 10, 1998. He ordered Respondent and the State Bar to confer regarding the questions of fact to be submitted to the jury. All stipulations as to the questions for the jury were to be submitted by January 16, 1989. all

objections to the other questions were to be filed by January 25, 1989 (R. 712).

On November 18, 1988 Respondent attempted to have Ms. Norey appear for deposition and produce evidence by serving a subpoena signed by the Special Master on Joe David Jackson (R. 715).

On December 12, 1988 the State Bar joined by the Special Prosecutor filed a Motion to Dismiss the disciplinary proceeding in Docket number 806 (R. 739).

On December 15, 1988 the State Bar filed a Motion for Extension of Time to Respond to Discovery Requests (R. 750).

On December 14, 1988 the Special Master addressed the State Bar's Motion to Dismiss in an order wherein he expressed reluctance to dismiss the matter. He ordered the State Bar to submit a brief and explain why Ms. Norey's testimony could not be compelled and why, if the testimony was not available, the case could not be proved by other evidence.

The response was ordered to be made by January 5, 1989. Discovery was extended until January 31, 1989 (R. 762).

On December 19, 1988 the Special Master granted the State Bar's Motion to Extend Time to Respond to Respondent's Discovery Documents, giving the State Bar until January 23, 1989 and not January 31, 1989 (R. 770).

Respondent complained in his Response to the State Bar's Motion to quash Subpoena, that he had not been given enough time to respond and give reasons why he should be allowed to take the deposition of Joe David Jackson (R. 773).

On December 29, 1988 Respondent filed a Motion for Disqualification and/or Recusal of Special Master (R. 822).

On December 29, 1988 Respondent filed a Request for Admission of Fact and Genuineness of Documents which contained 254 requests. (R. 872-917).

On January 5, 1989 the State Bar filed its Statement of Dismissal as required by the Special Master (R. 918).

On January 5, 1989 the State Bar filed its Response to Respondent's Motion to Recuse the Special master (R. 924).

On January 10, 1989 Respondent filed his Response to the State Bar's Statement of Dismissal (R. 985). In this Response Respondent objected to the use of Ms. Norey's deposition in any way (R. 988).

On January 19, 1989 the State Bar filed a Motion for Extension of Time to Respond to Respondent's Interrogatories, Notice to Produce and Request for Admission of Facts (R. 996). Respondent filed his response on January 20, 1989 (1000).

On January 19, 1989 the Special Master signed an order granting the State Bar an extension of time until further order (R. 1014).

On February 12, 1989 Respondent filed an

amendment to his Motion to Recuse complaining that the Special Master signed an order extending the State Bar's time to respond to discovery, after the Motion to Recuse was filed and after he had written the chairperson of the Review Panel that he would take no further action in the case (R. 1018).

On February 17, 1989 the Chairperson of the Review Panel filed his Order on Respondent's Motion to Recuse and Denied the Motion (R. 1033).

On February 28, 1989 Respondent filed his exceptions to the chairperson's order (R. 1036). The State Bar Responded on April 12, 1989 (R. 1042).

On April 21, 1989 the Review Panel sustained the chairperson's order denying Respondent's motion (R. 1049).

On January 30, 1989 Respondent initiated an action in the United State District Court for the Northern district of Georgia against

the General Counsel of the State Bar and the Special Master seeking to enjoin the proceedings. The Federal Litigation was dismissed on July 5, 1989 (R. 2038).

On July 13, 1989 the Special Master signed an order denying the State Bar's motion to dismiss the disciplinary proceedings. (R. 1053). The Special Master ordered that by August 21, 1989 the Respondent and the State Bar brief addressing certain facts that he found not to be in dispute (R. 1055).

On August 18, 1989 the Respondent filed his brief and asked that the complaint be dismissed (R. 1058). The State Bar filed its memorandum on August 21, 1989 (R. 1066) and suggested that "the Special Master could order a summary judgment against the Respondent" (R. 1074).

The Respondent filed Contreversion of Statement of Facts and Response to Memorandum of the State Bar on August 28,

1989 (R. 1076) and stated that the complaint should be dismissed or Summary Judgment should be entered in his favor (R. 1089).

On September 6, 1989 the Special Master filed his report making findings of undisputed fact and conclusions of law (R. 1091) finding that as a matter of law Respondent violated Rule 4-102(d) Standard 4 and 31 (R. 1097).

On September 5, 1989 Respondent filed his Objections to Proceedings and Challenges to Competency, Qualifications and Objectivity of Review Panel (R. 1103). On September 29, 1989 Respondent filed objections to the Special Master's report (R. 111). The State Bar responded with a memorandum on October 5, 1989 (R. 1149) and a Response on October 9, 1989 (R. 1158).

Various other motions, responses and amended objections and supplemental responses were filed between October 31, 1989 and October 20, 1989 (R. 1177-1292).

On October 20, 1989 the Review Panel considered the case and on November 1, 1989 filed its report (R. 1293). The Review Panel remanded the matter to the Special Master for proceedings consistent with the requirements of O.C.G.A. Section 9-11-56(c) (R. 1297).

On November 6, 1989 the Special Master entered an order requiring the State Bar to file a Motion for Summary Judgment by November 27, 1989 or the case would be dismissed (R. 1299).

The Respondent excepted to the Review Panel Report (r. 1301), filed an amended Plea in Abatement pursuant to O.C.G.A. Section 9-11-41 (C) (R. 1308) and Motion to Strike (R. 1324). The Special Master denied these motions on November 21, 1989 (R. 1518).

On November 15, 1989 the Respondent requested that the State Bar be required to respond to his Interrogatories, Request for

Admission of Fact and Notice to Produce (R. 1314). On November 22, 1989 the Special Master ordered the State Bar to respond not later than December 10, 1989. All "exculpatory" material was to be produced to Respondent in spite of any claim of work product (R. 15121-1522). The Special Master further ordered Joe David Jackson to give his deposition on matters related to the State Bar of Mr. Jackson's conduct (R. 1522) and the impartiality of the Special Master (R. 1524).

The State Bar filed its Motion for Summary Judgment on November 22, 1989 (R. 1334).

On November 28, 1989 Respondent filed another Motion to Recuse the Special Master (R. 1526). This motion was denied by the Special Master on November 29, 1989.

Also on November 29, 1989 the Special Master set a hearing on the Motion for Summary Judgment. The hearing was set for

January 5, 1990 (R. 1600). The Respondent was ordered to respond to the Motion for Summary Judgment by January 4, 1990 (R. 1600).

Various motions and responses were filed regarding discovery (r. 1605-1909).

On January 4, 1980 Respondent filed a Request for an In Camera Inspection (R. 1910), Objections to Hearing on Summary Judgment and Motion for Extension of Time within which to Respond (1915), Motion for Disqualification and/or Recusal of Special Master (R. 1928), Objections to the Special Master Proceeding (r. 1961) and his Response to the Motion for Summary Judgment (R. 1965). The Special Master denied all of Respondent's motions except that he granted an in camera inspection of the State Bar files (r. 2024).

A hearing was held on January 5, 1990 (R. 2038).

On January 17, 1990 the Special Master

filed his report (r. 2038) granting the State Bar's Motion for Summary Judgment (R. 2038).

Various objections, exceptions, motions and responses were filed (R.).

The Review Panel considered this matter on February 23, 1990 and granted Respondent's request for oral argument.

Findings of Fact

On March 29, 1982, the State Disciplinary Board determined that there was probable cause to charge Respondent with the violation of Standards 3, 4 and 45 of Part IV, Chapter 1 of the Rules and Regulations of the State Bar of Georgia (R. 5).

A formal complaint was filed by the State Bar on April 16, 1982 (R. 6-20). Respondent answered the complaint on July 16, 1982 (R. 83-95). Respondent requested a "trial by jury of all issues so triable." (R. 97). The Order appointing Special Master Thomas C. Sanders was signed on April

20, 1982.

The complainant Mae Conklin Norey employed the Respondent on December 18, 1978 for representation regarding her divorce from her husband. (R. 7 and 84).

Respondent filed a Libel for Divorce Complaint including a Notice to Produce, a Rule Nisi, and Temporary Restraining Order on December 27, 1978. (R. 7 and 85).

Ms. Norey paid Respondent a \$ 1,000.00 retainer fee. Respondent charged Ms. Norey \$1,000.00 and \$60.00 per hour to represent her in the divorce. (R. 85 and 910).

Respondent represented Ms. Norey at a hearing on temporary support and the request for a temporary restraining order on January 12, 1979 (R. 93). Respondent asserts he spent twelve hours at this hearing (R. 913). A temporary order was entered after the hearing, awarding Respondent \$750.00 attorney's fees on account. (R. 93).

On January 14, 1979 Ms. Norey's husband

was found dead. The cause of death was suicide. (R. 93).

On or about January 19, 1979, Ms. Norey and Respondent entered into an employment contract wherein he agreed to represent her "in any claim that she now has or in the future may have for property, both real and personal, money, stocks, bonds, bonds, insurance and any other tangible and intangible property which was either in the name of her husband--or in the name of herself and her (husband) at anytime from the 29th day of June, 1977." (r.26).

Respondent agreed to represent Ms. Norey in her "claim or cause of action against whomever"[he] deem[ed] liable as set forth above." (R. 26).

Respondent and Ms. Norey agreed that she "contributed \$23,000.00 to the home located at 11245 Oakhaven Drive, Roswell, Fulton County, Georgia." (R. 26).

It was noted in the contract that a lis

pendens was filed against the property on January 3, 1979. (R. 26). Respondent asserts he spent four hours on drafting and filing the lis pendens (R. 912).

It was noted in the contract that prior to his death the husband had "made an effort to transfer and dispose of funds and property in an effort to defeat any alimony claim" of Ms. Norey. (R. 26). The contract further provided the Respondent would "represent [Ms. Norey] in all claims that she may have for money or property, both real and personal, on a 'contingent fee' basis." (R. 26).

The contingency was described as follows:

a. [Respondent] shall charge [Ms. Norey] no fee for the first \$ 23,000 recovered of the house resided in by [Ms. Norey].

b. On all monies and/or situated, no matter from whom recovered, above the \$

23,000 investment in the house...[Ms. Norey agreed] to pay respondent a sum equal to 50% of the money or value of the property recovered immediately upon said recovery." (R. 26).

d. [Respondent] shall be entitled to his fee if [Ms. Norey] refuses to settle on the amount offered for settlement by the adversary party after being so advised by [Respondent].

The contract was signed by Respondent and Ms. Norey on January 18, 1979. On January 19, 1979 Respondent wrote Decatur Federal Savings and Loan and referenced the enclosure of a copy of the warranty deed on 1245 Oakhaven Drive, Roswell, Fulton County, Georgia (r. 1700).

The warranty deed on the martial residence showed that both Mr. and Ms. Norey owned the property as "Joint Tenants with right of survivorship and not as tenants in common." (R. 22).

On or about April 27, 1979 Ms. Norey contacted Respondent and informed him that Decatur Federal Savings and Loan Association had notified her that she was in default under the terms of the promissory note and Deed to Secure Debt executed by Ms. Norey and her husband. The February and March 1979 payments had not been made. (R. 16 and 92).

Respondent agreed to make the note payments if Ms. Norey would sign a deed putting 1/2 of the house in his name. (Resp. Depo, 5/5/86, p. 123). Ms. Norey signed a deed putting 1/2 of the Oakhaven Drive property in Respondent's name. (R. 33).

On the same date the warranty deed was signed Respondent prepared and both parties signed an agreement dated April 27, 1979 (r. 34). This agreement made specific mention that "the parties hereto have previously agreed that all monies recovered from the sale of the property mentioned above will be divided equally above the sum of \$ 23,000

for the sale of said property." (r. 34).

In exchange for Respondent's making the note payments the second contract provided that he would be reimbursed for those payments plus 7% interest after June 1, 1979 (R. 1987 and 1988).

On July 2, 1979 the Oakhaven Drive property was sold. The sum of \$ 44,541.49 was the net proceeds of the sale. (R. 72). The sum of \$ 7,144.76 was deducted at closing for various expenses; \$ 1,533.97 was deducted for April-July note payments for a total of \$ 8,678.73 as closing costs. (R. 72).

On July 9, 1979 Respondent redeemed a \$10,000 Certificate of Deposit which was titled in Ms. Norey and her husband's names as joint tenants with right of survivorship. The proceeds received were \$ 10,380.86 (R. 1891-1892). The original certificate was delivered to Respondent by the attorney representing Mr. Norey's daughters.

On July 11, 1979 Respondent presented a document to Ms. Norey titled "Accounting Between Larry Cohran and Mae Conklin Norey." (R. 84). A check in the amount of \$ 33,913.56 was also written to Ms. Norey and on the back of the check Respondent had typed the following:

"Not valid unless signed below this writing: By endorsement hereunder payee acknowledges a complete and satisfactory accounting with attorney Larry Cohran for the representation of payee in her divorce case and recovery of the Estate of John J. Norey up until 7-11-79, pursuant to contracts of employment date 1-18-79 and 2-19-78, and according to Accounting Statement dated 7-11-79.

Sale of House	\$ 44,391.49
Household items	5,838.50
Automobile	4,000.00
Tools & electrical equip	900.00
Recovery of Certificate	
of Deposit	10,380.86
Total	64,610.85
Norey less	<u>23,000.00</u>
1/2 of amt	42,510.85

	=	21,255.42
Less 1/2 of expense on sale of house		3,516.48
Less expense on house		3,131.15
Less atty fees on divorce		2,475.00
Less out of pocket expenses		194.41
Less items retained by Norey		<u>525.00</u>
		\$11,413.56
Plus		<u>23,000.00</u>
		34,413.56
Less \$500 held in escrow for depositions on case #C 49585		
Leaving		33,913.56

Payee (R. 25)

Respondent signed the July 11, 1979 "accounting" and the check endorsement. (R. 25 and 84).

The July 11, 1979 accounting given to Ms. Norey was substantially incorrect. The accounting represented that the amount of the proceeds from the sale of the house was \$ 44,391.49; the correct amount was \$ 44,541.49; a difference of \$ 150.00. Respondent admitted this but said it was a mathematical error (R. 88). The accounting charged Ms. Norey with \$ 3,703.28 that had already been deducted from the gross sales

proceeds. Respondent admits this error (R. 94). Also the accounting charged Ms. Norey with \$ 525.00, the full value of some personal property she kept, when she should only have been charged with \$ 262.50, one-half of the value. Respondent admitted this (R. 88-89). Further, the accounting charged Ms. Norey 2,264.43 for payments made on the Decatur Federal note when \$ 1,533.97 of that amount had already been deducted from the sales proceeds at closing. In addition, Ms. Norey was charged with \$ 500 "to be held in escrow" for depositions. (R. 66). No depositions were taken in any matter involving Ms. Norey's case (R. 9). Respondent stated that he had incurred a much greater amount in expenses for "lane tickets, lodging, expense" to go to New York. (Resp. depo 5/5/86, p 118.).

Finally Respondent charged Ms. Norey with the \$ 750 attorney's fees that the Superior Court had ordered Mr. Norey to pay

and did not credit her with \$ 450.00 paid to Respondent by Ms. Norey (Resp. depo 5/5/86, p. 132-143, Exb. 5 to depo and R. 114).

Respondent stated that the accounting mistakes were made by his secretary and that \$ 3,334.54 of the amounts that were charged to Ms. Norey in error were paid into the registry of the court on June 23, 1982 in a suit filed by Ms. Norey pending against Respondent (R. 88-89, 90, 94 and 1982).

Conclusions of Law

Challenges to competency, qualifications and objectivity of Review Panel and request to interview members of the Panel.

Each member of the Review Panel left the deliberations and was considered individually by the remaining panel members as to his or her competency, qualifications and objectivity. Panel member Mr. Chris Phelps voluntarily recused himself from all deliberations and vote regarding this matter. Respondent's challenges are without

merit. Respondent makes general objections on the ground that since the Review Panel members are members of the State Bar they cannot be objective as they have a monetary interest in having Respondent disbarred. There are over 20,000 members of the State Bar of Georgia. There are two non-lawyer members of the Panel. Three members are not in private practice. Of the other eight members, six practice outside the metropolitan Atlanta area. Of the 20,000 members of the State Bar over 10,000 practice in the Atlanta area. It is highly unlikely that any of the panel members would benefit financially from Respondent's disbarment.

Request for De Novo Hearing

The Review Panel has the discretion to grant a de novo hearing upon the unanimous consent of the Panel. Rule 4-218 (c). The Review Panel denied Respondent's request for a de novo hearing.

Plea in Abatement--O.C.G.A. Sections 9-11-41(e) and 9-2-60(b)

This matter originated in the Supreme Court of Georgia and has been pending in that court since its inception. An order from the Supreme Court in any case constitutes an order for purposes of O.C.G.A. Section 9-11-41(e) and 9-2-60(b), assuming those code sections apply to disciplinary proceedings.

The record reflects that there has not been a five year period in which there has not been the entry of an order in this case. The following is a list of Orders filed which are pertinent to Respondent's argument.

1. April 20, 1982--The Supreme Court entered an order appointing a Special Master;
2. April 11, 1984--The Court of Appeals entered an order appointing a Special Prosecutor;

3. April 18, 1984--The Supreme Court entered an order denying Respondent's Motion to Dismiss or Deny Petition for Appointment of Special Prosecutor;

4. March 19, 1984, The Supreme Court entered an order on various motions of the parties;

5. May 24, 1988--The Special Master entered an order denying Respondent's Motion to Strike and Motion for Summary Judgment.

The Special Master's denial of Respondent's Plea in Abatement was proper. Respondent's Request for Jury Trial.

Respondent has requested that the case be remanded to the Special Master and that the Special Master be directed to forward the proceedings to the appropriate superior court for disposition in accordance with Bar Rules 4-214, 4-215, 4-216, 4-217 and 4-218.

Rule 4-214 provides in part: "(a) In all cases the respondent shall have the right to have any material issue of fact

determined by a jury." (Emphasis added).

Rule 4-215 provides that "[if] the respondent elects to have material issues of fact determined by a jury in the superior court, the Special Master shall file with the clerk of the appropriate superior court a complete copy of the record in said case, including a list of special questions of fact upon which a jury verdict is sought." (Emphasis added.)

Not every respondent who requests a jury trial is entitled to have the superior court review the Special Master's rulings. Only cases in which there remain material issues of fact must be sent to the superior court.

It is clear that the Special Master has the authority to grant a motion for summary judgment. Matter of Peek, 257 Ga. 349 (1987). The decision in Matter of Vaughn, 259 Ga. 186 (1989), does not support Respondent's argument that this case should be remanded to be reviewed by a superior

court. In Vaughn there was material issues of fact still remaining to be determined by a jury as the Special Master had only granted a partial summary judgment.

This is the logical interpretation of Rule 4-214 through 4-218, as in a summary judgment on all issues of fact, the Special Master's rulings are immediately reviewed by the Review Panel and ultimately by the Supreme Court. The purpose of these rules is for respondent to have the right to have material issues of fact decided by a jury, not for him to have the right to have the Special Master's decisions reviewed by a superior court judge.

Respondent's request for remand and direction that the record be sent to the appropriate superior court is denied.

Recusal of Special Master

The first Motion for Recusal made by the Respondent was considered by the Chairperson of the Review Panel, reviewed by the full

panel and denied.

Respondent filed two other Motions to Recuse the Special Master (r. 1526 and 1928). The Review Panel carefully considered Respondent's motions and found that they are without merit and legally insufficient.

Respondent asserts that under the separation of powers requirement, Ar. I, Sec. II, Par. III, of the State Constitution, the Special Master may not concurrently serve as a judicial officer, i. e. Special Master, under appointment by the Supreme Court and as a special assistant attorney general under appointment of the Attorney General.

"The separation of powers provision is fundamental to our constitutional form of government. However, it does not follow that a complete separation is desirable or intended [or even possible]. In Re: Pending Cases, 234 Ga. 264, 215 S.E.2d 473 (1975).

(Matter in brackets added).

Rule 4-209 of the State Bar Rules provides for the appointment as special master "members of the State Bar of Georgia."

O.C.G.A. Sections 45-15-4 and 45-15-30 authorize the Attorney General "to select and employ private counsel" "any attorney at law under independent contract," recognizing that such attorney "may engage in the private practice of law."

any private attorney appointed as a special assistant attorney general is necessarily a member of the State Bar of Georgia--regulated in his professional conduct ultimately by the Supreme Court of Georgia--and an officer of the Court. Any such attorney so appointed is thus concurrently a representative of the executive department of the State and an officer of the judicial branch. Sams v. Olah, 225 Ga. 497, 169 s.e.2d 790 (1969); In

Re. Pending Cases, 234 Ga. 264, 215 S.e.2d 473 (1975).

The separation of powers mandate of the Constitution obviously does not, and could not partially, prevent that duel role.

Ibid; see also, Harrison Co. v. Code Revision Comm'n, 244 Ga. 325, 260 s.e.2d 30 (1979).

Service as a special master appointed under Rule 4-209 is service required incident to and solely as a result of an attorney's membership in the Bar and role as an officer of the Court.

Service as a special assistant attorney general appointed under O.C.G.A. Sections 45-15-4 and 45-15-30 is service permitted only as a result of an attorney's membership in the Bar and his role as an officer of the Court.

Thus, representation of the executive department by "private counsel, otherwise engaged in the private practice of law" and

"under independent contract" (representation permitted only because he is an officer of the Court) does not involve the exercise of executive duties or functions such as to foreclose that private counsel's appointment (to which he is subject only because he is an officer of the Court) as a special master to perform functions which any other private counsel--as an officer of the Court--may be called upon to perform.

Respondent also asserts that the Special Master is disqualified on two grounds.

First, Respondent asserts that disqualification arises because, when sued by Respondent in federal district court along with the General Counsel for the State Bar, the Special Master inquired of the State Bar as to whether the State Bar's liability insurance carrier would provide a defense and such defense was ultimately provided by that carrier. The defense was not directly provided or paid for by the

State Bar and the State Bar did not select counsel.

The inquiry did not relate to this case, or its merits, and thus did not involve and improper ex parte communication.

The provision of litigation defense through attorneys representing solely the Special Master by an insurance carrier under a contract of insurance, pre-existing the commencement of litigation, and covering those engaged in the performance of official responsibilities under the Rules of the organized State Bar does not constitute and impermissible financial or business transaction with a party, or a gift, bequest, favor or loan, or improper expense reimbursement. Such a transaction is not in kind or degree difference from compensation paid or insurance that might be provided by State to any State judicial officer, which clearly does not foreclose the judicial officer from sitting on a case involving the

State.

Respondent further asserts that Mr. Justice Bell of the Georgia Supreme Court inquired ex parte of counsel for the State Bar as to the status of this and a related disciplinary case against Respondent. Mr. Jackson's deposition reflects that the inquiry related solely to the procedural status and not to the merits of either case and not to Respondent. No such communication even remotely bears upon the qualifications of the Special Master.

Respondent's claim may be pertinent to Mr. Justice Bell's participation in any Supreme Court decision involving this matter, but it is not pertinent to the continued functioning of the Special Master.

However, the Review Panel notes that Mr. Justice Bell's inquiry related solely to the procedural status of the case, not to its merits.

In addition Respondent asserts that the

Special Master's December 18, 1989 order denying Respondent's motion under Rule 4-221(b)(2)(iii) for contempt sanctions reflects bias on the part of the Special Master. A claim of bias or partiality based solely upon an adverse ruling is not legally sufficient. This claim was addressed by the previous order of the Review Panel.

Finally, the Supreme Court of Georgia possess inherent authority to regulate the practice of law. First Bank & Trust Company v. Zagoria, 250 Ga. 844; Wallace v. Wallace, 225 Ga. 102, 109 (1969), cert denied, 396 U.S. 939 (1969); Sams v. Olah, 225 Ga. 497 (1969). In the exercise of this authority, the State Bar of Georgia was created as an administrative arm of the Court, and the Supreme Court promulgated rules for the government of disciplinary proceedings. The Supreme Court maintains an active role in every disciplinary case once a formal complaint is filed, and it does not

relinquish its control over the proceedings until a final order is entered by the Court in the case. Special masters are appointed as a part of the disciplinary process, and their primary function is to make a recommendation that will ultimately be reviewed by the court.

Special masters appointed by the Supreme Court in disciplinary proceedings are analogous to special masters appointed by the Superior Court judges to hold hearing in condemnation proceedings. Both types of special masters serve at the pleasure of the court and are removable at any time with or without cause. See O.C.G.A. 22-2-103.

Other than pure conjecture and self serving speculation by the Respondent, there has been no showing by the Respondent that the court's removal of the first Special Master and subsequent appointment of Special Master Sweeney was in any way improper.

Discovery of Mae Norey Transcript

Regardless of the manner in which the interview or recorded statement of Mae Norey is characterized, the Special Master was correct in not requiring the State Bar to produce the Mae Norey transcript for discovery by Respondent. On or about June 24, 1986, the State Bar of Georgia filed a notice to take the deposition of Mae Norey. On August 5, 1986, Respondent filed a Motion to Quash, a Motion for Protective Order, and a Certificate of Conflict as to the taking of the deposition. Although Respondent's motions prevented any deposition from taking place pursuant to O.C.G.A. Section 9-11-30, on August 11, 1986, the State Bar conducted a recorded interview of Mae Norey. Respondent was not present. Respondent asserted that Ms. Norey's deposition should not be used or considered by the Special Master because he was not able to be present.

When the State Bar filed its Motion for

Summary Judgment, the State Bar did not include a transcript of the interview with Ms. Norey.

The Special Master was correct in concluding that the recorded statement taken under the circumstances outlined above, does not constitute a "deposition" within the meaning of O.C.G.A. Section 9-11-30, or as contemplated by the November 7, 1989 order of the Special Master. A recorded statement of a witness, taken by a party incident to litigation is trial preparation material. It is discoverable only upon the showing required by O.C.G.A. Section 9-11-26(b)(3). Tobacco Road, Inc. v. Callaghan, 174 Ga. App. 539 (1985).

Respondent has never made a sufficient showing pursuant to O.C.G.A. Section 9-11-26(b)(3) to obtain the recorded statement of the complaining witness in this case. At the time Respondent sought the transcript, the only issues before the Special Master

were those pertaining to Court IV of the Formal Complaint. All other counts of the Formal Complaint has been resolved in Respondent's favor. The conclusion by the Special Master that Respondent violated Standard 4 was based solely on the facts contained in the record and did not depend on the Norey transcript.

Moreover, had Respondent wanted to depose the complainant during the course of these proceedings, he has had sufficient time and opportunity. In particular, during the summer of 1986, when the Bar attempted to schedule the deposition, Respondent had an opportunity to arrange a date and time that would be convenient for all concerned. Respondent did not take advantage of the opportunity.

In an effort to obtain the Mae Norey transcript, Respondent argues the applicability of Wills v. Composite State Board of Medical Examiners, 259 Ga. 549

(1989) which requires the production of exculpatory material in certain licensing cases. Although the State Bar did not concede that the Wills case was applicable to disciplinary proceedings, the State Bar agreed that the requirements of the Wills case had nonetheless been satisfied. The Special Master conducted an in camera inspection of the file of the State Bar, including the recorded interview of Mae Norey. Based on this inspection, the Special Master concluded that the files did not contain material that would be favorable or arguably favorable to Respondent.

Summary Judgment

A Special Master has the authority to grant summary judgment. Matter of Peek, 257 Ga. 349 (1987).

The material facts as to which the Special Master found there was no genuine issue are set forth in the record at pages 2041-2050. The Review Panel adopts and

approves the findings of fact of the Special Master and in addition adds the following findings.

The January 18, 1979 contract between Respondent and Ms. Norey was clearly a contingency fee contract. Respondent was not to be paid unless he recovered for Ms. Norey property which her husband had attempted to convey to defeat her alimony claim. It appears from the record that at the time the January 18, 1979 contract was signed Respondent knew that the marital residence was owned by Mr. and Ms. Norey as joint tenants with right of survivorship. Respondent represented Ms. Norey in the original divorce proceeding and filed a lis pendens on the property. He claims he spent four hours filing and preparing the lis pendens. Further, one day after the date of the contract he sent a letter to Decatur Federal and enclosed a copy of the warranty deed.

Respondent stated he advised Ms. Norey her husband could have transferred anything they owned jointly to someone else and it would have to be set aside. (Resp. depo 5/5/86, p. 116).

Respondent took no action to recovery the marital residence for Ms. Norey because no action was ever necessary. The marital residence became hers on the date of Mr. Norey's death by operation of law and was never part of Mr. Norey's estate.

The April 27, 1979 agreement and the warranty deed signed by Ms. Norey doe snot support Respondent's present claim that he was to get a 1/2 interest in the marital residence just for taking the case. As to the second contract, he explained in his deposition that, "[he] did not want Ms. Norey to go sell the house and take off with the money after I's been putting money out on the house. So I went ahead and advanced payments on it to keep it from being

foreclosed."

In his deposition Respondent also stated again that the original contract was a contingency fee contract. He agreed to represent Ms. Norey "for one-half of everything that we recovered above what was hers already, which including everything from the estate. And of course, we knew that the house was going to be involved in the estate." (Resp. depo 3/3/86, p. 123). Yet, when he made his accounting to Ms. Norey, he represented to her that he was entitled to one-half of the value of the marital residence and kept that amount for himself knowing that the house was not part of the state and that he had done nothing to recover it for Ms. Norey. further, the endorsement on the check written to Ms. Norey stated "for the representation of payee in her divorce case and recovery of the Estate of John J. Norey, pursuant to contracts of employment dated 1-18-79 and 2-

19-78." No mention was made of the April, 1979 contract.

Respondent's actions were and are dishonest within the meaning of Standard 4 of Rule 4-1-2. He is held to the standard of a fiduciary in his dealings with his clients. Respondent's representations to his client at the time of the accounting were willful misrepresentations within the meaning of Standard 4, Rule 4-102.

Recommendation

Respondent has violated Rule 4-1-2(d) Standard 4. A violation of this standard may be punished by disbarment. The nature of the discipline to be imposed in each case is to be decided based on the facts of the particular case. "The question is not what punishment may the offense warrant, but what does it require as a penalty to the offender, a deterrent to others, and as an indication to laymen that the courts will maintain the ethics of the profession." In

the Matter of Dowdy, 247 Ga. 488 at 493 (1981).

The facts of this case support not only a violation of Standard 4, but also violations of Standards 31, 32, 61 and 63. However, the complaint alleges only a violation of Standards 3, 4 and 45, so Respondent cannot be disciplined for a violation of any Standard but Standard 4. The facts supporting a violation of the other Standards - can be considered in aggravation for purposes of imposing the highest level of discipline allowed for a violation Standard 4.

Standard 32 provides in part that "a lawyer shall not advance or guarantee financial assistance to his client." Respondent freely admits that he advanced payments on the outstanding mortgage to Decatur Federal for Ms. Norey. In addition he was to be paid 7% interest on those payments he made. Respondent apparently

sees nothing wrong with this conduct, yet is it a clear violation of Standard 32.

Standard 61 provides: "A lawyer shall promptly notify a client of the receipt of his funds, securities, or other properties and shall promptly deliver such funds, securities or other properties to the client. A violation of this standard may be punished by disbarment.

Respondent submitted two statements to Ms. Norey with an accounting on the funds he claims he recovered for her. The first one was the July 11, 1979 document titled "Accounting Between Larry Cohran and Mae Conklin Norey." The second was the endorsement on the back of the check for \$ 33,913.56 made to Ms. Norey. Both documents contained substantial errors. Respondent signed both documents. However, Respondent asserts his secretary (who is not his wife and refused to answer questions based on spousal privilege) prepared the July 11,

1979 document. Respondent admits that there were errors in the documents, but that they were honestly made. However, Respondent did not refund any part of the money held in error until after Ms. Norey filed a lawsuit in Superior Court and after the formal complaint was filed in this proceeding. In addition, Respondent refunded only a portion of those times that were withheld. He has still not properly accounted to Ms. Norey for the other funds. "A failure to properly supervise his staff and establish procedures and safeguards for dealing with funds held in a fiduciary capacity constitutes a failure to account for funds in violation of Standards 63 and 65.: In the Matter of Bach, ___ Ga. ___ (1989).

Standard 63 requires that "a lawyer maintain complete records of all funds,...of a client...and promptly render appropriate accounts to his client regarding them." Respondent's actions show a clear violation

of Standard 63.

Finally, Respondent asserts that the Special Master had no authority to continue the proceedings in the fact of the State Bar's Motion to Dismiss. However, the Respondent ignores one of the major functions of the disciplinary proceedings, to protect the members of the public. Practicing law is not just the right to make a living. The preamble to the Canons of Ethics expresses the importance of a lawyer's duty:

"The future of this State and the Republic, of which it is a member, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and motives of the members of our profession are such as to merit the approval of all just men."

Respondent, W. Larry Cohran, has violated the duty owed to his client and to this honored profession. The Review Panel

recommends that Respondent W. Larry Cohran be disbarred and that his name be stricken from the roll of attorneys allowed to practice law in this state.

This 6th day of March, 1990.

s\Martha C. Christian
Chairperson, Review Panel
State Disciplinary Board

[Decided January 17, 1990]

In the Supreme Court of Georgia

In the Matter of W. Larry Cochran
Supreme Court Docket No. 250,
State Disciplinary Board Docket No. 806

REPORT OF SPECIAL MASTER

I. This proceeding was initiated by formal complaint dated April 16, 1982. On December 12, 1988, the State Bar moved to dismiss this proceeding. The Special Master by Order dated December 14, 1988 requested the State Bar more fully to set forth the basis of its Motion which the State Bar did on January 5, 1989. On December 29, 1988, Respondent filed a motion for disqualification or recusal of the Special Master. That motion was referred to the Review panel for disposition. Thereafter, on January 30, 1989, the Respondent initiated an action in the United States District Court for the Northern District of Georgia against the General Counsel of the State Bar and the Special Master seeking to enjoin the pro-

ceedings. Pending action by the Review Panel on the motion to recuse, and in deference to the District Court, no action was taken in this matter until after denial of the motion to recuse on April 21, 1989, and subsequent dismissal of the federal litigation on July 5, 1989.

On July 13, 1989, in response to the Bar's then-pending motion to dismiss, the Special Master requested the State Bar and Respondent to brief before August 21, 1989, whether certain facts were undisputed and, if so, whether those undisputed facts compelled a conclusion that as a matter of law the Respondent had violated certain standards set forth in Rule 4-102. The parties did so and based on those submissions, the Special Master issued a final report on September 5, 1989, determining that certain facts were undisputed and as a matter of law constituted a violation of certain standards set forth in Rule 4-102.

On October 30, 1989, the Review Panel determined that the summary procedure leading to the final report was improper, that any summary determination must follow O.C.G.A. 9-11-56(c), and the procedure set forth above did not. The matter was remanded to the Special Master.

On remand, the State Bar filed a motion for summary judgment on November 22, 1989. On November 29, 1989, the Special Master issued an order scheduling the motion to for hearing on January 5, 1990, and directed Respondent to file opposing papers on or before January 4, 1990.

A hearing was had as scheduled on January 5, 1990.

II. The basis of the State Bar's Motion to dismiss this proceeding is the Bar's judgment that the Bar will encounter substantial difficulty in prosecution of this case because the Complainant, who now resides outside the State, is unwilling to

return to Georgia for trial and the Bar's further judgment that the Complainant's testimony by deposition may not be persuasive.

With respect to those aspects of the case that are disputed by Respondent, that depend upon the testimony of the Complainant, and that will turn on a jury resolution of conflicts in testimony, the Special Master is reluctantly inclined to concur with the State Bar's Motion and accordingly suggests the dismissal of this case in accordance with the State Bar's Motion as to all aspects of the complaint which appear to depend on disputed facts. Those matters include all disputed averments of Count One of the Complaint and all disputed averments of Count Two of the Complaint, except those related to the matters addressed in Paragraph IV of the Report, and all disputed averments of Count Three except those which are addressed in

Paragraph III of this Report.

III. With respect to the matters alleged in Count Three, it is not disputed on this record that during the course of his representation of the Complainant, the Respondent entered into an agreement with the Complainant to advance and, in fact, Respondent advanced to or on behalf of the Complainant, funds sufficient to pay liabilities of the Complainant under the mortgage encumbering the Complainant's residence and to pay other liabilities of the Complainant relating to the property. Respondent concurrently obtained the Complainant's execution of a warranty deed conveying Respondent a undivided one-half (1/2) interest in the property, for the purpose of confirming his claim to fifty (50%) percent of the value of the property under the fee agreement described below in Paragraph IV of this Report, and Complainant's agreement to reimburse

Respondent for such advances.

An issue was presented as to whether, as a matter of law, Respondent's conduct violates Rule 4-102(d), Standard 32, or other standards set forth in that rule upon which discipline may be based.

However, the State Bar Disciplinary Board did not find probable cause on Standard 32 and or other potentially applicable standards and the State Bar states that absent such a finding, it is without authority to prosecute Respondent with respect to a violation of that Standard. Accordingly, the Special master reluctantly suggests a dismissal of Count Three of the Complaint.

IV. As to the matters, alleged in Count Two, the Report is as follows:

MATERIAL FACTS AS TO WHICH THERE
IS NO GENUINE ISSUE

On the record before the Special Master at the time of the hearing on the State

Bar's motion for summary judgment, there is no genuine issue as to any of the following material facts:

1. Respondent entered into a January 18, 1979 agreement with Complainant which provides, in pertinent part, as follows:

"WHEREAS, the party of the first part [Respondent] agrees to represent party of the second part [Complainant] to the best of his ability and take whatever legal action he deems necessary for and in consideration as hereinafter set forth; and

WHEREAS, [Complainant] desires [Respondent] to represent [Complainant] in any claim that she now has or in the future may have for property, both real and personal, money, stocks, bonds, insurance and any other tangible or intangible property which was either in the name of her husband, John J. Norey, or in the name of herself and John J. Norey at any time from the 29th day of June, 1977.

NOW, THEREFORE, in consideration of the premises...it is hereby covenanted and agreed as follows:

1. [Respondent] agrees to represent [Complainant] in her claim or cause of action against whomever the [Respondent] deems liable as set forth above, and shall have exclusive control over all negotiations and litigation thereto.
2. The parties agree that the [Complainant] contributed \$ 23,000.00 to the [marital residence].

It is understood and agreed to between the parties that the husband of the [Complainant] deceased this life on January 14, 1979 and said death was claimed to have been caused by suicide, and prior to his death he made an effort to transfer and dispose of funds and property in an effort to defeat any alimony claim by [Complainant].

It is agreed between the parties that

[Respondent] will represent [Complainant] in all claims that she may have for money or property, both real and personal, on a "contingent fee" basis and said contingency shall be as follows:

- a. [Respondent] shall charge the [Complainant] no fee for the first \$ 23,000.00 recovered of the [marital residence].
- b. On all monies and property received of every kind and nature; wherever recovered and/or situated, no matter from whom recovered, above the \$ 23,000.00 investment in the house above set forth, the [Complainant] agrees to pay [Respondent] a sum equal to 50% of the money or value of the property recovered immediately upon said recovery and parties hereto expressly agree that the [Respondent] shall have a lien upon all said property above-mentioned for the amount that he is entitled to receive as attorney's fees."

2. At the time of his death, Complainant's husband and Complainant held title to their residence jointly with the right of survivorship.

3. Respondent, on deposition in this proceeding, testified that incident to the Respondent and Complainant entering into the agreement:

"I told [the Complainant] that Mr. Norey could transfer his interest that [real] property before he died. If--there's nothing in the law to prevent him from doing that. That if he had done that, then we'll have to fight whoever he's transferred it to.****That he could not transfer--he could not transfer her half interest in the property away but he could certainly transfer his. (Deposition of Respondent [May 5, 1986], p.115). I gave [Complainant] that advice in regard to anything he owned. (Deposition of Respondent [May 5, 1986], p.116).

Q. Was there an issue as far as [Complainant's] rights in that property was concerned?

A. Certainly.

Q. Would you describe that for me?

A. Yes. Mr. Norey...tried to give away everything he could before he died.***Any my job was to get everything back I could. (Deposition of Respondent [May 5, 1986], p. 109-110)."

While that testimony is not essential to the conclusions of law stated below (which would be drawn even if Respondent told the Complainant nothing), the testimony is consistent with the intent of the agreement apparent from a reading of it. The testimony thus reinforces those conclusions.

4. In Respondent's August 17, 1989 brief in response to the Special Master's July 13, 1989 Order, Respondent states:

"It was not known at that time whether Mr. Norey had transferred his interest in

the house to his daughters...If Mr. Norey had transferred his interest in the property prior to his death, which he certainly could have done, there might not have been anything realized over \$ 23,000 and it was possible that a suit to recover that amount would have to be filed to recover this amount for [Complainant]. And, of course, Respondent would not have been entitled to any fee if the \$ 23,000 was all that was received. Brief at p.4.

Again, that admission is consistent with the intent of the agreement apparent from its face. It is not, however, essential to the conclusions of law stated below but merely reinforces those conclusions.

5. The January 18, 1979 agreement is not ambiguous. However, Respondent testified as to his intent as follows:

"It was a contingency fee basis because she had no money to pay an attorney to do anything. And so I agreed to do it on a

contingency fee basis. So I agreed to represent her for one-half of everything that we recovered above what was hers already, which including everything from the estate. (Deposition of Respondent [May 5, 1986], p. 123). In other words...what it boils down to is it was a case that I got a fee in. It could have been just exactly the opposite way.***Then I might have gone through three or four years of legal work to try to set it aside and maybe not set it aside and maybe never got a dime out of it. (Deposition of Respondent [May 5, 1986], pp. 113-114)."

Again, that testimony is consistent with the intent of the agreement apparent from a reading of it. That testimony is not, however, essential to the conclusion of law stated below but merely reinforces those conclusions.

6. In fact, Complainant's husband had not made any transfer of the marital residence

or his interest in it. As a result, the entire interest in the marital residence passed to the Complainant by operation of law upon her husband's death. Respondent neither took action nor was required to take action to obtain that transfer.

7. Nevertheless, even though Respondent had not by any action on his part recovered the property for the Complainant or taken any action whatsoever to do so. Respondent charged the Complainant and retained from funds otherwise due the Complainant by Respondent a fee equal to one-half (1/2) of the proceeds derived from the sale of the property, calculated after the deduction of the "\$ 23,000.00 investment" referenced in the AGreement and certain deductions claimed to have been authorized or purported to be authorized by other agreements between Respondent and the Complainant.

8. As set forth above, Respondent asserts that at the time the fee agreement was

entered into, Respondent was not aware of the status to the title of the marital residence.

However, it is not on this record disputed that some four (4) months prior to Respondent's preparation of an accounting for his fees, Respondent was fully aware both of the manner in which the property was titled and that the property passed by operation of law to the Complainant upon her husband's death without any action on the part of the Respondent or the necessity of any such action. Respondent, in fact, some four (4) months prior to the preparation of accounting for his fees, prepared a deed for signature by the Complainant conveying to Respondent one-half (1/2) interest in the property. That conveyance was not (as Respondent now contends by argument but not by testimony) the result of some new agreement. Respondent has testified that that conveyance was intended to effect the

January 18, 1979 agreement. (Deposition of Respondent [May 5, 1986], pp. 121-122).

In sum, it is not on this record disputed that Respondent did not by any action on his part "recover" the property for his client. Respondent did not take any action looking toward any such recovery, and that at the time of his accounting, Respondent knew that no action on his part had been taken or was ever necessary to or had resulted in a "recovery" of the property for his client.

9. Nevertheless, even though Respondent had not by any action on his part recovered the property for the Complainant, and even though Respondent then knew that, in his subsequent preparation of the accounting to the Complainant for his fees, Respondent charged to the Complainant and retained from funds otherwise due the Complainant one-half (1/2) of the proceeds derived from the sale of the property. As is clearly

reflected by the Respondent's position in this matter, the calculation was not the result of a mistake or inadvertence or negligence on the party of Respondent.

CONCLUSIONS OF LAW

1. The facts set forth above present an issue as to whether, as a matter of law, Respondent's conduct violated Rule 4-102(d), Standard 4 or Standard 31.
2. With respect to Standard 31, the State Bar Disciplinary Board did not find probable cause on that Standard and the State Bar represents that absent such a finding, the State Bar is without authority to prosecute Respondent on that Standard.
3. However, the Complaint does assert that the facts set forth above constitute a violation of Rule 4-102(d), Standard 4.
4. Respondent contends that under the terms of the agreement set forth above, the Respondent was entitled to fifty (50%) percent of the value of all money and

property "received" by the Complainant which was previously in the name of ~~complaint's~~ husband or in the name of both Complainant and her husband regardless of whether Respondent's efforts had anything to do with the Complainant's receipt of such property. That construction of the agreement is patently absurd.

The agreement clearly contemplates that Respondent would represent the Complainant

"in all claims that [Complainant] may have for money or property, both real or personal, on a 'contingent fee' basis and said contingency shall be as follows:*** on all monies and properties received of every kind and nature; wherever recovered and/or situated, no matter from whom recovered...[Complainant] agrees to pay party of the first part a sum equal to 50% of the money or value of the property recovered immediately upon said recovered...

On its face, the agreement clearly

contemplates a contingent fee dependent upon Respondent's recovery of money or property in connection with a claim as to which Respondent provides legal services and is calculated in reverence to monies and properties "recovered" and/or situated no matter from whom recovered."

To accept Respondent's argument would be to contort this agreement into an agreement by the Complainant not to pay a "contingent fee," depending on the outcome of a "contingency," but an absolute undertaking to pay without any contingency at least one-half (1/2) of the value of the marital residence regardless of whether any "claim" was necessary to obtain the residence, regardless of whether Respondent's efforts resulted in "recovery" of the residence, regardless of whether Respondent's efforts resulted in any other "recovery," and regardless of the extent of Respondent's efforts with respect to the residence or any

other property or claim. Such a construction flies in the face of the expressed nature and terms of the agreement as a "contingency" dependent upon "recovery" as a "contingent fee" for services with respect to a "claim" in obtaining such a "recovery." Respondent's construction is patently absurd.

Moreover, as set forth above, Respondent's testimony reinforces that conclusion. Respondent testified that the purpose of the agreement was to establish a "contingent fee basis" (Deposition, p. 123) under which Respondent would have maybe never got a dime out of it (Deposition, p. 113-114), and under which Respondent agreed to represent her for one-half of everything that was recovered above what was hers already... (Deposition, p. 123).

5. When Respondent prepared the accounting of his fees for the Complainant, Respondent knew that he had not taken any action and

had not been required to take any action to recover the marital residence for the Complainant. Complainant's ownership of the marital residence was obtained by operation of law. Respondent's accounting to the Complainant represents an affirmation by the Respondent that the legal services for which payment is made have been rendered and that such payment is due in accordance with the agreement between the Respondent and the Complainant.

6. Respondent occupied the status and owed to his client the duties of a fiduciary.
7. Standard 4 provides "a lawyer shall not engage in professional conduct involving dishonesty." Respondent's conduct was, as a matter of law, dishonest.
8. The Standard also provides that a lawyer "shall not engage in professional conduct involving...a wilful misrepresentation." Respondent's accounting to this client constituted a representation to his client

that he was entitled to a fee equal to one-half (1/2) of the value of the marital residence and his collection of that fee affirmed that representation. That representation was false and, as reflected by the Respondent's position in this case, was wilful and was not the result of mistake, inadvertence, or negligence.

9. Respondent, by an Objection to Special Master Proceeding with Hearing on Summary Judgment, asserts that any determination with respect to whether the undisputed facts reflect a violation of the standards established by Rule 4-102(d) circumvents Respondent's right to a trial by jury as he has demanded and that the Bar's motion must be referred to the Superior Court under Rule 4-215 as an "evidentiary motion." Rule 4-214(a) provides that the Respondent shall have the right to a jury trial only as to "material issues of fact." With respect to the matters set forth above, there are no

material issues of fact to be determined by a jury and, thus, Respondent has no right to a jury trial under Rule 4-214. Referral to the Superior Court is required only where the proceeding itself is referred for jury trial. **Matter of Peek**, 257 Ga. 349, ___ S.E.2d___ (1989). "Evidentiary motions" are those which arise incident to such a jury trial.

10. Respondent asserts that the process of determining legal issues on undisputed facts violates his right to due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States and under Article 1, Section 1, Paragraph 1 and Article 1, Section 1, Paragraph 2 of the Constitution of this State. Those claims are frivolous. See, e.g. **Fidelity & Deposit Co. v. United States**, 187 U. S. 315 (1902).

11. Respondent asserts that the Bar's motion is insufficient because the matters

asserted are required to be proven beyond a reasonable doubt. Since there is no genuine issue as to any of the facts on which this part is based, regardless of the standard of proof, the burden has been satisfied.

12. On January 13, 1990, the Special Master examined and initialed the original files of the State Bar delivered to the Special Master on January 12, 1990 pursuant to Respondent's motion for an in camera inspection pursuant to *Wills v. Composite State Board of Medical Examiners*, 259 Ga. 549, ____ S.E.2d (1989). The files contains no material which is favorable or arguably favorable to Respondent on the matters decided in this Part IV. A copy of the files examined is transmitted with this report under seal.

V. There being no other matters which require a determination of the Special Master, this report of the Special Master is submitted to the Review Panel pursuant to

Rule 4-217.

Dated: January 17, 1990.

s\ Timothy J. Sweeney, Special Master

Harman Owen Saunders & Sweeney, P.C.
1900 Peachtree Center Tower
230 Peachtree Street, NW
Atlanta, Georgia 30303
(404) 688-2600

[Decided January 8, 1990]

In the Supreme Court of Georgia

In the Matter of W. Larry Cohran
Supreme Court Docket No. 250,
State Disciplinary Board Docket No. 806

O R D E R

Respondent has moved for reconsideration
of the Special Master's Order of December
18, 1989.

1. Regardless of the State Bar's prior
improper characterization of the recorded
interview of Mae Norey on August 11, 1986,
as a "deposition" or even its belief that it
was taking a "deposition" or had taken a
"deposition," the recorded interview was not

a deposition to with O.C.G.A. 9-11-30 or Sams v. Champion, 184 Ga. App. 44, 361 S.E.2d 852 (1987) or the November 7, 1989, Order in this case apply. Respondent's Motion to Quash the deposition notice and for a protective order and certificate of conflict prevented any "deposition" to which those authorities or the November 7, 1989, Order would be applicable from taking place. As Respondent notes in his Motion, because of Respondent's actions, the recorded statement "would not be admissible for use as evidence by the Bar." O.C.G.A.9-11-30 and Sams v. Champion and the November 7, 1989, Order in this case apply to "depositions" which are so admissible because the "depositions" are taken in accordance with the procedures established by the Civil Practice Act, including the opportunity of any party to participate. Respondent's actions prevented any such "deposition" from taking place.)

2. A recorded statement of a witness, taken by a party incident to litigation, is not a deposition, but is trial preparation material and is not discoverable under the Civil Practice Act absent the showing required by O.C.G.A. 9-11-26(b)(3). **Clarkson Industries v. Price**, 135 Ga. App. 787, 218 S.E.2d 921 (1975), on which Respondent relies, has been overruled. **Tobacco Road, Inc. v. Callaghan**, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

The recorded interview is thus not discoverable under the Civil Practice Act absent the required showing. No such showing has been made in this case.

3. The recorded interview of Ms. Norey may be nevertheless obtained by Respondent under **Wills v. Composite State Board of Medical Examiners**, ___ Ga. ___, ___ S.E.2d ___ (No. 47048, 1989). However, the State Bar has asserted that no materials in its files, including Ms. Norey's recorded interview,

contains exculpatory matter. Under such circumstances, Respondent is not entitled to obtain the statement unless as a result of an in camera examination requested by Respondent, the Special Master determines that the statement is favorable or arguably favorable. Since Respondent's request for an in camera examination was made separately, it will be addressed by a separate order. Accordingly, it is hereby ORDERED that Respondent's Motion for Reconsideration of the December 18, 1989, Order is DENIED.

Dated: January 8, 1990.

s\ Timothy J. Sweeney, Special Master

[Decided November 11, 1989]

In the Supreme Court of Georgia

In the Matter of W. Larry Cohran
Supreme Court Docket No. 250,
State Disciplinary Board Docket No. 806

O R D E R

The Review Panel having remanded the proceeding to the Special Master, it is hereby ORDERED:

1. The State Bar shall file any motion for summary judgment it desires to file, in such form and substance as is required by O.C.G.A. 9-11-56, including any supporting affidavits, not later than November 27, 1989. The motion shall be accompanied by a statement of the material facts as to which the State Bar contends that there is no genuine issue. The State Bar shall file with the motion a copy of all depositions taken in this matter.

2. In the event the State Bar elects not to file a motion for summary judgment, the State Bar shall file with the Special

Master before the date set forth above a statement as to whether it desires to proceed with this matter or, instead, to dismiss in accordance with its prior motion.

Dated: November 6, 1989.

s\ Timothy J. Sweeney, Special Master

Harman Owen Saunders & Sweeney, P.C.
1900 Peachtree Center Tower
230 Peachtree Street, NW
Atlanta, Georgia 30303
(404) 688-2600

[Decided July 13, 1989]

In the Supreme Court of Georgia

In the Matter of W. Larry Cochran
Supreme Court Docket No. 250,
State Disciplinary Board Docket No. 806

O R D E R

The State Bar has moved to dismiss this proceeding. The basis of the Motion is the Bar's judgment that the Bar will encounter substantial difficulty in prosecution of the case because the Complainant, who now

resides outside the State, is unwilling to return to Georgia for trial and the Bar's further judgment that the Complainant's testimony by deposition may not be persuasive.

With respect to those aspects of the case that are disputed by Respondent, that depend upon the testimony of the Complainant, and that will turn on a jury resolution of conflicts in testimony, the Special Master is reluctantly inclined to concur with the State Bar's Motion and to forward to the Review Panel a report suggesting the dismissal of this case in accordance with the State Bar's Motion.

However, the following facts do not appear to be in dispute:

1. First, it is not disputed that Respondent entered into a written agreement with the Complainant in which the Respondent agreed to represent the Complainant with respect to any claim that the Complainant

might have to property titled in the name of her husband, who died four days prior to the agreement, or in the name of the Complainant and her husband. The agreement essentially provided that Respondent would be entitled to a fee of 50% of the money or value of property "recovered immediately upon said recovery," "on all monies and property received of every kind and nature, wherever recovered and/or situated."

At the time of his death, Complainant's husband and Complainant held title to their residence jointly with a right of survivorship.

Respondent asserts that at the time the agreement was entered into, Respondent was not aware of the status of the title to the property.

However, it is not on this record disputed that some four months prior to Respondent's preparation of an accounting for his fees, Respondent was fully aware of

the manner in which the property was titled and that the property passed by operation of law to the Complainant upon her husband's death without any action on the part of the Respondent or the necessity for any such action. Respondent, in fact, prepared a deed for signature by the Complainant conveying to Respondent one-half interest in the property. In sum, it is not on this record disputed that Respondent did not by any action on his part "recover" the property for his client and that at the time of his accounting, Respondent knew that no action on his part was necessary to or had resulted in a "recovery" of the property for his client.

Nevertheless, even though Respondent had not by any action on his part recovered the property for the Complainant, and even though Respondent then knew that, in his subsequent preparation of the accounting the Complainant for his fees, Respondent charged

to the Complainant and retained from funds otherwise due the Complainant one-half of the proceeds derived from the sale of the property, calculated after certain deductions authorized or purported to be authorized by other agreements between Respondent and the Complainant.

Thus, the undisputed facts present an issue as to whether, as a matter of law, Respondent's conduct violates Rule 4-102(d), Standard 4, Standard 31 or other standards set forth in that Rule upon which discipline may be based.

2. Second, it is also not disputed on this record that during the course of his representation of the Complainant, the Respondent entered into an agreement with the Complainant to advance and, in fact, Respondent advanced to or on behalf of Complainant, funds sufficient to pay liabilities of the Complainant under the mortgage encumbering the Complainant's

residence or to pay other liabilities of the Complainant relating to the property. Respondent concurrently obtained the Complainant's execution of a warranty deed conveying Respondent an undivided one-half interest in the property, apparently for the purpose of confirming his claim to 50% of the value of the property under the fee agreement described above, and the Complainant's agreement to reimburse Respondent for such advances.

Thus, an issue is presented as to whether, as a matter of law, Respondent's conduct violates Rule 4-102(d), Standard 32, or other standards set forth in that Rule upon which discipline may be based.

Accordingly, it is hereby ORDERED that the State Bar and the Respondent shall, not later than August 21, 1989, submit to the Special Master briefs on each of the issues described above.

SO ORDERED, this 13th day of July, 1989.

s\ Timothy J. Sweeney, Special Master
Harman Owen Saunders & Sweeney, P.C.
1900 Peachtree Center Tower
230 Peachtree Street, NW
Atlanta, Georgia 30303
(404) 688-2600

IN THE SUPREME COURT OF GEORGIA

Atlanta May 30, 1991

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

IN THE MATTER OF: W. LARRY COHRAN

Upon consideration of the Motion for Reconsideration and the Motion to Stay filed in this matter, it is ordered that they are hereby denied.

Clarke, C.J., Smith, P.J., Weltner, Hunt and Benham, and Judges Winegarden and Henderson concur. Bell and Fletcher, JJ., not participating.

Supreme Court of the State of Georgia,
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

"No person shall answer for a capital, or otherwise infamous crime,..not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"Section 1...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATUTES INVOLVED

O.C.G.A. 9-11-56 (f) (summary judgment statute) provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or

depositions to be taken or discovery to be had, or may make such other order as is just."

O.C.G.A. 9-11-29.1 provides in pertinent part:

"(a) Depositions and other discovery material otherwise required to be filed with the court under this chapter shall not be required to be so filed unless:... (2) Ordered by the Court (3) Requested by any party to the action;... (5) such material is to be used at trial or is necessary to a pretrial or post-trial motion and said material has not previously been filed under some other provision of this chapter... (b) Until such time as discovery material is filed under paragraphs (1) through (5)... the original of all depositions shall be retained by the party taking the deposition... and the person thus retaining the deposition... shall be the custodian thereof."

O.C.G.A. 9-11-30 (f) provides in pertinent part:

"(1)(A) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing..."

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent."

GEORGIA STATE BAR RULES AND REGULATIONS

"Rule 4-209. docketing by Supreme court; Appointment of Special Master; Challenges to Special Master--

(a) Upon receipt of a finding of probable cause, a petition for appointment of a special master and proposed order thereon and a formal complaint from the Investigative Panel, the Clerk of the Georgia Supreme Court shall file the matter in the records of the Court, give the matter a docket number and notify the Court that appointment of a special master is appropriate...

Rule 4-212. Answer of Respondent; Discovery--

(a) The respondent shall serve an answer to the formal complaint of the State Bar within thirty days after service of the formal complaint....(c) Both parties to the disciplinary proceeding may engage in discovery under the rules of practice and procedure then applicable to civil cases in the State of Georgia....

Rule 4-213. Evidentiary Hearing--

(a) Within ninety days after the filing of respondent's answer to the formal complaint or the tie for filing of the answer, whichever is later, the special master shall proceed to hear the case. The evidentiary hearing shall be stenographically reported and may be

transcribed at the request and expense of the requesting party. When the hearing is complete, the special master shall proceed to make findings of fact and conclusions of law and file a report with the Review Panel as hereinafter provided. Alleged errors in the trial may be reviewed by the Supreme Court when the findings and recommendations of discipline of the Review Panel are filed with the Court. There is to be no direct appeal from such proceedings of the special master.

(b) Upon a showing of necessity and a showing of financial inability by the respondent to pay for the transcript, the special master shall order the State Bar of Georgia to provide the transcript.

Rule 4-214. Respondent's Right to Trial by Jury; Special Questions--

(a) In all cases the respondent shall have the right to have any material issues of fact determined by a jury in the superior court of the county of the respondent's residence, or, in cases where the respondent is a nonresident, by a jury in a superior court selected under the provisions of Rule 4-221(c).

(b) The respondent shall move for trial by jury in writing at or before the time the answer to the formal complaint is due. In the absence of such a written motion, the respondent will be deemed to have chosen to have an evidentiary hearing conducted by the special master.

(c) If the respondent elects trial by jury, the parties shall then frame separate special questions of fact to be submitted to the jury. In the case of disagreement between the parties as to the form of the

questions to be submitted, the special master shall frame such questions based upon the pleadings and the evidence at the time of the trial subject to review by the judge of the superior court.

Rule 4-215. Proceedings in Superior Court; Jury Trial--

(a) If the respondent elects to have material issues of fact determined by a jury in the superior court, the special master shall file with the clerk of the appropriate superior court a complete copy of the record in said case, including a list of the special questions of fact upon which a jury verdict is sought.

(b) Before filing a complete copy of the record with the superior court, the special master shall:

(1) Rule upon all motions, except for evidentiary motions.

(2) In the case of disagreement between the parties as to the form of the questions to be submitted, the special master shall determine the questions to be submitted to the jury.

(c) After the record is filed with the superior court and completion of discovery, the case shall be specially set for trial. On the trial of such issues, the jury shall not pass upon the culpability of the respondent or upon the question of whether punishment shall or shall not be imposed, but the jury shall in each case render a special verdict giving specific answers to the special questions of fact which shall be submitted to it by the court. All such trials shall be stenographically reported and may be transcribed. Alleged errors in

the trial may be reviewed as provided in Rule 4-219 hereof, but there shall be no direct appeal from such proceedings.

(d) The superior court judge shall review all rulings made by the special master and affirm, modify, reverse or remand the rulings prior to trial, rule upon all evidentiary motions and shall preside over the trial of the case.

(e) The President of the State Bar of Georgia shall, upon request by the Office of the General Counsel, appoint one or more special prosecutors to assist Office of the General Counsel in the preparation and trial of all such cases which warrant such appointment...

Rule 4-216. Proceedings in Superior Court; Transmission of Findings to Review Panel--Upon the rendition of a special verdict in the superior court, the clerk of said court shall promptly transmit a copy of the special verdict of the jury to the special master, certified under the seal of the superior court, who shall prepare a report to the Review Panel forthwith. copies of the findings of the jury shall also be transmitted to the respondent and to counsel for the State Bar.

Rule 4-217. Report of the Special Master to the Review Panel--

(a) Within forty-five days after the evidentiary hearing the special master shall file his report to the Review Panel at the headquarters of the State Bar of Georgia in accordance with Bar Rule 4-221, which report shall contain the following:

(1) findings of fact on the issues

raised by the formal complaint, and

(2) conclusions of law on the issues raised by the pleadings of the parties.

(b) The special master shall deliver a copy of his findings of fact and conclusions of law to the respondent and to counsel for the State Bar at the time such report is filed with the Review Panel.

Rule 4-218. Findings by the Review Panel--

(a) Upon receipt of the report from the special master, the Review Panel shall consider the record, make findings of fact and conclusions of law and determine whether a recommendation of punishment and disciplinary action will be made to the Supreme Court and the nature of such recommended punishment and discipline. The findings of fact and conclusions of law made by a special master shall not be binding on the Panel and may be reversed by it on the basis of the record submitted to the Panel by the special master.

(b) The respondent shall have the right to challenge the competency, qualifications or objectivity of any member of the Review Panel considering the case against him under a procedure as provided for in the rules of the Panel.

(c) There shall be no de novo hearing before the Review Panel except by unanimous consent of the Panel and the respondent.

(d) The Review Panel may grant rehearings, or new trials, for such reasons, in such manner, on such issues and within such times as the ends of justice may require.

(e) The Review Panel may consider exceptions to the report of the special master and may in its discretion grant oral argument. Exceptions and briefs shall be filed with the Review Panel, in accordance with Bar Rule 4-221(f), no later than twenty days prior to the next scheduled meeting. The responding party shall have ten days after service of the exceptions within which to respond.

(f) The Review Panel shall file its report and the complete record in the disciplinary proceedings with the Clerk of the Supreme Court. A copy of the Panel's report shall be served upon the respondent.

Rule 4-219. Judgements and Protective Orders--

(a) After the Review Panel's report is filed with the Supreme Court, the respondent and the State Bar may file with the Court any written exceptions, supported by written argument, each may have to the Panel's report. All such exceptions shall be riled with the Court within twenty days of the date that the Review Panel's report is filed with the Court. The respondent party shall have an additional twenty days to file its response with the Court. Findings of fact by the Review Panel shall be conclusive if supported by any evidence. The Court may grant oral argument on any exception filed with it upon application for such argument by a party to the disciplinary proceedings. The Court will promptly consider the report of the Review Panel, exceptions thereto, if any, and the response filed by any party to such exceptions, if any, and enter judgment upon the formal complaint. A copy of the Court's judgment shall be transmitted to the

State Bar and the respondent by the Court...

Rule 4-221. Procedures--...

(2) The following shall subject a person to rule for contempt of the special master or Panel:... (iii) wilful or flagrant violation of a lawful directive of a special master or Board member.

It shall be the duty of the... special master to report the fact to the superior court in and for the county in which said investigation, trial or hearing is being held. The superior court shall have jurisdiction of the matter and shall follow the procedures for contempt as are applicable in the case of a witness subpoenaed to appear and give evidence on the trial of a civil case before the superior court under the laws in Georgia...

(4) Depositions may be taken by the respondent or the State Bar in the same manner and under the same provisions as may be done in civil cases under the laws of Georgia, and such depositions may be used upon the trial or an investigation or hearing in the same manner as such depositions are admissible in evidence in civil cases under the laws in Georgia...

(e) Burden of Proof; Evidence

(1) In all proceedings under this Chapter the burden of proof shall be on the State Bar of Georgia, except for proceedings under Bar Rule 4-106 [suspension or disbarment for commission of a crime].

(2) In all proceedings under this chapter occurring after a preliminary investigation as described in Rule 4-204, the procedures and rules of evidence

applicable in civil cases under the laws of Georgia shall apply, except that the quantum of proof required of the State Bar shall be beyond a reasonable doubt....

Rule 4-222. Limitation--

(a) No proceeding under these rules shall be brought unless a Memorandum of Complaint has been received at State Bar of Georgia headquarters or initiated by the Investigative Panel within four years after the commission of the act. Provided, however, this limitation shall be tolled during the period of time, not to exceed two years, that the offender or the offense is unknown, the offender's whereabouts are unknown, or the offender's name is removed from the roll of those authorized to practice law in this State....

Rule 4-225. Jurisdiction--

The State Disciplinary Board and any person connected with disciplinary proceedings in any way shall not be subject to the jurisdiction of any court other than the Supreme Court with respect thereto, except as provided in Rule 4-214, 4-215 and 4-216.

[April 3, 1990]

In the Supreme Court of Georgia

In the Matter of W. Larry Cochran
Supreme Court Docket No. 250,
State Disciplinary Board Docket No. 806

MOTION TO REMAND

[Affidavit of Victoria D. Little, Attorney

for Respondent]

"13. For several months, I have attempted to contact Ms. Norey at a telephone number I believed to be her home telephone number; however, I was never able to get anyone to answer.

14. On March 27, 1990, at approximately 10:00 P.M., a person who identified herself as Mae Norey answered at telephone number 508-667-5993.

15. I specifically questioned Ms. Norey about the marital residence, and what her complaint was with Mr. Cohran. She stated that she was present at the closing of the house when she and her husband had purchased the property and knew that the house was titled in both their names with right of survivorship. I asked her if Mr. Cohran had ever indicated to her or made her believe that he had done anything to recover the house for her after her husband's suicide or if she thought that he had done anything to

recover the house for her? Her response was, "That's crazy, recover from whom, a dead man?" She stated that she knew that her husband had not transferred the house to any third person, and Mr. Cohran never represented to her that he took any action to recover the property or that he was charging her for recovering the property. I asked her if she had ever told anyone that Mr. Cohran had represented to her that he had recovered the house. She stated that she had not, that that was not what her complaint was about. She said that even though she thought that Mr. Cohran was a crook, she did not want to pursue the action, and she had advised the Bar that she did not want to be bothered with it.

She stated that she had wanted to do something about it years ago while she was living in Georgia, but she had not been able to get anything done, and that she did not want to do anything now. She stated that

she could not remember all of the details now because it had been so many years ago, and since she had moved to Massachusetts, she had had open heart surgery and she did not want to bother with it.

I asked her specifically what Mr. Cohran had one to make her think that he was a crook. She said that while she was upset and distraught about her husband's suicide, Mr. Cohran had her sign a contract for him to get paid a lot more than it was worth for the work he did. She gave no other details of the alleged crooked conduct.

She stated that Mr. Jackson knew all of this, and that she though the matter had ended. I asked her if she would sign an affidavit regarding the matter related to me. She stated that she did not want to be bothered, that she had already given an affidavit to Joe David Jackson, that it was a lot of trouble for her to have to go out to get someone to notarize it for her, and

she thought the matter was ended--that she clearly stated that those were her wishes.

She stated that if I wanted an affidavit to get it from Mr. Jackson, that she did not want to be bothered anymore...

17. After talking with Ms. Norey, it appears that the very conduct upon which the Bar has moved for summary judgment and upon which the Special Master and Review Panel have founded Respondent's guilt and for which it is asking that Respondent be disbarred is not conduct of which Respondent is guilty. It also appears that the State Bar knew this at the time it made its motion for summary judgment. It also appears that this is why the State Bar has refused to turn over Ms. Norey's deposition and the affidavit sent to it by Ms. Norey.

18. Upon learning this information, I placed a call to Mr. Joe David Jackson who is no longer employed by the State Bar, but who had handled this matter for the Office

of General Counsel from its inception until approximately February, 1990. He did not return my call, and I placed several more calls to him before being able to talk with him on March 30, 1990. I relayed the information to him, told him that I thought a great injustice was about to occur and that it would appear that the Bar had known that Mr. Cohran had never made the misrepresentation for which he was about to be disbarred. Mr. Jackson stated that he had "washed his hands" of the matter, that he did not work for the Bar anymore and that he did not want to have anything to do with the matter. When I asked him if Ms. Norey had ever told him that Mr. Cohran had not made any representation to her that he had recovered the marital residence, he stated, "Not in those exact words." Mr. Jackson abruptly ended the conversation...

20. We [State Bar counsel and Petitioner's attorney] conference called Mr. Sweeney

[special master] in this regards. Mr. Sweeney stated that the matter was out of his hands, that he had no jurisdiction over the matter, and could do nothing at this point...

23. Late in the afternoon on April 3, 1990, I spoke with Mr. William Smith, General Counsel of the State Bar. I told him what Ms. Norey had told me regarding this matter as I have set forth herein. He stated that he did not feel that it was relevant to the case or to the issues before the Supreme Court. I invited him to participate in a conference call to Ms. Norey to verify what Ms. Norey had told me, and he declined to do so stating that the time for discovery was over, and that he did not plan to take any action to correct the matter."

